Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

THE STATE OF OHIO,
Petitioner,

v.

STEVEN FARRIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the suppression of post-*Miranda* warning statements because they cover the same information as pre-*Miranda* warning statements even when there is no police strategy to intentionally avoid *Miranda*.

2. Whether the Supreme Court of Ohio departed from established principles of the Fifth Amendment when it determined the combined pre- and post-*Miranda* questioning of Stephen Farris violated the Federal Constitution even though there was no police strategy to intentionally bait Farris into talking before the *Miranda* warning.

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INTRODUCTION

Federal courts and state supreme courts are divided over the appropriate standard to use when determining whether post-*Miranda* warning statements should be admitted into evidence when pre-*Miranda* warning questioning occurred without the intent to avoid *Miranda v. Arizona*, 384 U.S. 436 (1966). The State of Ohio seeks to appeal the decision of the Supreme Court of Ohio because the Supreme Court of Ohio has misinterpreted this Court's decisions on an issue of federal law, applied an incorrect legal test, and erroneously suppressed statements made by Stephen Farris.

The Supreme Court of Ohio did not rely on independent state constitutional grounds in making this particular determination. Instead, it ignored the holding of *Missouri v. Seibert*, 542 U.S. 600 (2004), and applied the plurality's "effective warning" test to determine if the pre-*Miranda* warning questioning of Farris made his post-*Miranda* warning statements inadmissable.

The Supreme Court of Ohio is not the only state supreme court to apply *Seibert* in this way. The Supreme Courts of Vermont and Louisiana have also treated the *Seibert* plurality opinion as the holding of the case. This is in contrast to three circuit courts and the Supreme Court of Kentucky, which regard Justice Kennedy's opinion as the holding of *Seibert*. Now, this Court's guidance is needed to resolve the split on this important legal issue for law enforcement, and the courts.

PETITION FOR A WRIT OF CERTIORARI

The State of Ohio respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (Pet. App. 1a - 23a) is published at 109 Ohio St.3d 519, 849 N.E.2d 985, and 2006-Ohio-3255. The opinion of the Ohio Court of Appeals for the Ninth Appellate District (Pet. App. 24a - 33a) is reported at 2004-Ohio-826. The opinion of the Wayne County Municipal Court (Pet. App. 34a - 37a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 12, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall... be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

Legal Background

1. In *Seibert*, a four Justice plurality of this Court said, "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Seibert*, 542 U.S. at 611-612. A majority of this Court expressly rejected the test articulated by the plurality in *Seibert*. *Seibert*, 542 U.S. at 622 ("In my view, this test cuts too broadly.")(Kennedy, J., concurring in judgment), and, *Seibert*, 542 U.S. at 622 - 623 ("I believe that we are bound by [*Oregon v.*] *Elstad*[, 470 U.S. 298 (1985)] to reach a different result...")(O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Thomas, J.).

Justice Kennedy, who supplied the fifth vote in favor of suppressing Seibert's statements, provided the narrowest opinion concurring in the *Seibert* judgment. Therefore, the holding in *Seibert* is found in the opinion of Justice Kennedy. *U.S. v. Mashburn*, 406 F.3d 303, 308 - 309 (4th Cir. 2005), citing, *Marks v. U.S.*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

In his opinion, Justice Kennedy stated,

> The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the

> deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. *Seibert*, 542 U.S. at 622.

2. Courts are divided over which opinion is the holding of *Seibert*. The Supreme Court of Ohio treated the four Justice plurality opinion as the holding, *Farris*, 109 Ohio St.3d 519, {¶ 30}; Pet. App. 12a, and highlighted its confusion stating:

> Seibert was a plurality opinion, leaving somewhat in doubt whether the intent of the officer in garnering the prewarning statement is important in determining whether a postwarning statement is admissible. Id at {¶ 31}. Pet. App. 13a.

3. In this case several issues were brought before the Supreme Court of Ohio. The Supreme Court of Ohio determined the admissibility of Farris's post-*Miranda* statements by applying only federal law. The current resolution of the case prevents the State from prosecuting Farris. The State would be able to prosecute Farris if the Supreme Court of Ohio is reversed, and his post-*Miranda* warning statements are admissible.

Factual Background

4. The facts of the case are undisputed. Trooper Menges of the Ohio State Highway Patrol was on routine patrol on U.S. 30 in Wayne County, Ohio. He observed the defendant's vehicle traveling eastbound at 68 m.p.h. in a 60 m.p.h. zone, and initiated a traffic stop. When Trooper Menges approached the defendant's vehicle he smelled a

light odor of burnt marijuana. Trooper Menges had drug training and was very familiar with the odor of burnt marijuana. He smelled raw marijuana and then burnt marijuana while being trained, and estimated that he smelled burnt marijuana inside 200 stopped cars.

Farris was told of the reason for the stop, and was asked to come back to the patrol vehicle. He was frisked, and emptied his pockets. Farris then got into the passenger seat of the patrol car. Trooper Menges asked Farris about the odor and was told Farris's house mates smoked marijuana earlier. Trooper Menges told Farris that he was going to search the vehicle. Then Trooper Menges asked Farris if there was any contraband in the vehicle. Farris told him that the trunk contained a pipe, which Farris used to smoke marijuana.

The defendant was then given *Miranda* warnings and again asked if there was any contraband in the vehicle. Farris again stated that a pipe was in the vehicle's trunk. The inside of the car was searched and nothing was found. Then the trunk was searched. Trooper Menges found rolling papers and the pipe, which contained marijuana residue. Trooper Menges field tested the pipe and it came back positive for marijuana. Farris was given a speed warning, a drug paraphernalia citation, and allowed to go. *State v. Farris*, No. CRB-02-12-0101, slip op. (Wayne Co. Municipal Ct. April 29, 2003). Pet. App. 34a - 35a.

Procedural History

5. In the trial court Farris filed "Pretrial Motions for Suppression of Evidence and Other Relief" in which he argued his statements were obtained illegally and in violation of Petitioner's constitutional rights under the United States Constitution, and the Ohio Constitution. Farris explained this position further in "Defendant's

Supplemental Brief in Support of Motion to Suppress." The State argued in its brief that the second statements were admissible under this Court's decision in *Elstad*.

6. The trial court denied the Motion to Suppress with regard to the second statement. In its order, the trial court determined that "[t]he first location statement should be suppressed, the second should not as full *Miranda* rights were given and voluntarily waived." Pet. App. 36a.

7. Farris, pursuant to the Ohio Rules of Criminal Procedure, preserved his right of appeal by entering a no-contest plea, and appealed the trial court's denial of the Motion to Suppress to the Ohio Court of Appeals for the Ninth Judicial District ("Ninth District"). Farris argued that neither inculpatory statements were admissible under *Elstad* and similar decisions. Again, the State argued in its appellate brief that the post-*Miranda* statements are admissible under *Elstad* because "the admissibility of any subsequent statements should turn in these circumstances solely on whether it is knowingly and voluntarily made." State's appellate brief, p. 6, citing, *Elstad*, 470 U.S. at 309 (emphasis added in the State's appellate brief).

8. The Ninth District unanimously overruled Farris's argument stating:

> Defendant chose to speak to the officer following the officer's recitation of the *Miranda* warnings. Defendant told the officer that he understood those rights. He did not in any way indicate his wish to exercise any of his *Miranda* rights. He did not preface his response with 'since I already told you,' or any other phraseology in that vein. Rather, he, again, answered the question of the officer in spite of being

> informed of his right to remain silent. The mere fact that the officer immediately repeated the same question following the *Miranda* warnings should have indicated to Defendant, a college student, that he was free to embrace his *Miranda* rights and remain silent. Defendant's acts indicate that he voluntarily, knowingly, and intelligently waived his *Miranda* rights. *State v. Farris*, 2004 - Ohio - 826 {¶14}. Pet. App. 30a.

9. After the Ninth District decided the case, this Court issued its decision in *Seibert*.

10. Farris then appealed to the Supreme Court of Ohio. Farris continued to argue that his statements were obtained in violation of *Miranda*. In response, the State argued that the post-*Miranda* statements should be admitted, and cited and distinguished this Court's decision in *Seibert*.

11. The Supreme Court of Ohio determined that under federal law, as explained by a plurality of this Court in *Seibert:*

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. *Farris*, 109 Ohio St.3d 519 {¶20}, 849 N.E.2d 985, 2006-Ohio-3255 (2006), citing, *Seibert*, 542 U.S. at 611-612. Pet. App. 7a. See also, *Farris*, 109 Ohio St.3d 519, {¶21} (Post warning statements are inadmissable if the warning is not effective.) Pet. App. 7a - 8a.

The Supreme Court of Ohio ignored the fact that a majority of this Court expressly rejected the test articulated by the plurality in *Seibert*. *Seibert*, 542 U.S. at 622 ("In my view, this test cuts too broadly.")(Kennedy, J., concurring in judgment), and, *Seibert*, 542 U.S. at 622 - 623 ("I believe that we are bound by *Elstad* to reach a different result...")(O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Thomas, J.). Also, the Supreme Court of Ohio dismissed Justice Kennedy's more narrow opinion, and the apparent holding of *Seibert*, because the court agreed "with the *Seibert* plurality and dissent that the intent of the officer doing the questioning is not relevant in a *Miranda* analysis." *Farris*, 109 Ohio St. 519, {¶35}. Pet. App. 14a.

12. The Supreme Court of Ohio then applied the "effective warning" test and suppressed the statements. *Farris*, 109 Ohio St.3d 519, {¶¶30, 36}. Pet. App. 12a, 14a. The Supreme Court of Ohio did this despite acknowledging that, "A difference between this case and *Seibert* is the seeming lack of an official police strategy to intentionally bait suspects into talking before the *Miranda* warning and then repeating damaging statements later after the warning has been given." *Farris*, 109 Ohio St.3d 519, {¶31}. Pet. App. 31a - 32a. Had the Supreme Court of Ohio recognized that Justice Kennedy's more narrow opinion is the *Seibert* holding, Farris's second set of statements would be admitted into evidence under *Elsted*.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons.

First, the Supreme Court of Ohio's decision highlights the division among the courts on the proper application of *Seibert*. Courts are confused. On one hand,

at least three state supreme courts treat the plurality opinion in *Seibert* as the case's holding when determining if pre-*Miranda* warning questioning taints post-*Miranda* statements. On the other hand, at least three circuit courts and one state supreme court treat Justice Kennedy's opinion as the holding of *Seibert* when reviewing the same issue. This case presents the Court with an opportunity to resolve this conflict, and clarify an important area of law.

Second, the Supreme Court of Ohio's analysis, based entirely on federal law, essentially overturned this Court's decision in *Seibert* by accepting the plurality's opinion as the holding. Since there was no intent to avoid *Miranda*, the Supreme Court of Ohio should have applied *Elstad*. Instead, it dismissed the holding of *Seibert* while claiming to follow this Court's guidance. The Supreme Court of Ohio essentially made itself the 10th member of this Court, voted with the plurality opinion, and changed *federal* law in Ohio.

Courts do not know if a defendant's statements are admissible when there was both pre- and post-*Miranda* questioning of the defendant, but no police strategy to intentionally bait the suspect into talking before the *Miranda* warning. This case cleanly presents this specific federal issue to the Court for review.

I. The Court should settle the split between some state supreme courts and the circuit courts over the application of *Seibert*.

1. There is a division among state supreme courts and circuit courts on how to apply the Fifth Amendment. This division occurs in situations where there is questioning of an individual both before and after *Miranda* warnings. The problem is that courts do not agree on how to apply this Court's decision in *Seibert*. This lack of clarity in federal

law caused the Supreme Court of Ohio to inappropriately suppress evidence and hinder the prosecution of Farris.

2. Three circuit courts and the Supreme Court of Kentucky, have recognized Justice Kennedy's opinion as the proper holding of *Seibert*. In the past year, however, at least three state supreme courts, including Ohio's, have treated the *Seibert* plurality as the holding of the case. Justice Kennedy's opinion is the narrowest position taken by a Justice that concurred in the *Seibert* judgment. The courts following his opinion say it controls because "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *U.S. v. Mashburn*, 406 F.3d 303, 308 - 309 (4th Cir. 2005), citing, *Marks v. U.S.*, 430 U.S. 188 (1977).

3. The Supreme Court of Ohio mistakenly treated the plurality decision in *Seibert* as the holding. In doing so, it quoted the *Seibert* plurality and stated:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. *Farris*, 109 Ohio St.3d 519 {¶20}, citing, *Seibert*, 542 U.S. at 611 - 612. Pet. App. 7a. See also, *Farris*, 109 Ohio St.3d 519, {¶21} (Post warning statements are inadmissable if the warning is not effective.) Pet. App. 7a - 8a.

The Supreme Court of Ohio then went on to apply the factors identified in the *Seibert* plurality opinion to this case. *Farris*, 109 Ohio St.3d 519 {¶30}. Pet. App. 12a.

The actual holding of *Seibert*, however, appears to be Justice Kennedy's opinion, which states:

> The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. *Seibert*, 542 U.S. at 622.

The Supreme Court of Ohio dismissed Justice Kennedy's opinion, stating:

> *Seibert* was a plurality opinion, leaving somewhat in doubt whether the intent of the officer in garnering the prewarning statement is important in determining whether a postwarning statement is admissible. *Farris*, 109 Ohio St.3d 519 {¶ 31}. Pet. App. 13a.

4. In the past year other state supreme courts have followed the plurality opinion. *State of Vermont v. Yoh*, ____ A.2d ____, 2006 VT 49, 2006 WL 1739117, was decided on June 30, 2006. In *Yoh*, the Supreme Court of Vermont made a statement similar to the Supreme Court of Ohio's statement of the law. The Supreme Court of Vermont said:

> The plurality opinion described the relevant analysis for determining whether warnings following a *Miranda* violation are effective: "The threshold issue... is thus whether it would be reasonable to find that in these

> circumstances the warnings could function 'effectively' as *Miranda* requires." *Yoh*, 2006 VT 49 at {¶ 14}, citing, *Seibert*, 542 U.S. at 611 - 612.

Also, in *Louisiana v. Leger*, ____ So.2d. _____, 2006 WL 1883421, which was decided on July 10, 2006, the Supreme Court of Louisiana stated that this Court "found that a midstream recitation of Miranda warnings could not comply with the object of Miranda, i.e. that the 'warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture.'" *Leger*, 2006 WL 1883421, *16, citing *Seibert*, 542 U.S. at 612.

5. These decisions stand in stark contrast to the decisions of three circuit courts and the Supreme Court of Kentucky. Unlike the Supreme Courts of Ohio, Vermont, and Louisiana, this second group of courts applied the rule in *Marks*, and found that Justice Kennedy's opinion is the actual holding in *Seibert*. *U.S. v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005)("Kennedy's opinion therefore represents the holding of the *Seibert* Court: The admissibility of postwarning statements is governed by *Elstad* unless the deliberate 'question-first' strategy is employed."), *U.S. v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004)("Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*."), *U.S. v. Black Bear*, 422 F.3d 658, 664 (8th Cir. 2005)("Second, the key to *Seibert* is whether the police officer's technique was a designed, deliberate, intentional, or calculated circumvention of *Miranda*.")(internal quotes omitted), and *Jackson v. Kentucky*, 187 S.W.3d 300, 309 (2006)("We have determined that the narrowest holding, rendered by Justice Kennedy, precludes use of the technique only where police deliberately employ the technique to circumvent the

suspect's *Miranda* rights.")(internal quotes omitted); see also, *People v. Paulman*, 5 N.Y.3d 122, 134, fn.5, 833 N.E.2d 239 (2005)("Since Justice Kennedy's narrower test is triggered only when the police have intentionally employed a 'question first' practice – which did not occur here – we need not address it further.").

6. Courts are split on how to apply *Siebert*. It appears that Justice Kennedy's opinion should be controlling, but some courts, including the Supreme Court of Ohio, have, instead, applied the plurality's opinion. Since the decision in this case did not follow Justice Kennedy's opinion, the Supreme Court of Ohio's decision effectively overruled this Court on an issue of federal law in Ohio.

By refusing to follow Justice Kennedy's opinion in *Seibert*, the Supreme Court of Ohio perpetuates the confusion on what opinion represents the holding of *Seibert*, and how *Seibert* should be applied. This Court should grant a writ of certiorari to prevent the application of *Miranda*, *Elsted*, and *Seibert* from becoming a "crazy quilt" spread across the land. If this split among courts is not resolved, citizens, law enforcement, and courts will continue to be confused about a person's rights under the Fifth Amendment.

II. The Supreme Court of Ohio erroneously suppressed Farris's statements because it misapplied or effectively overruled a decision of this Court by treating *Seibert*'s plurality opinion as federal law.

1. "[W]hen state courts erroneously invalidate [state] actions because they believe federal law requires it – and *especially* when they do so because they believe the Federal *Constitution* requires it – review by this Court, far from

undermining state autonomy, is the only possible way to *vindicate* it." *Kansas v. Marsh*, ___ U.S. ____, 126 S.Ct. 2516, 2531 (2006)(Scalia, J., concurring). Further, "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

2. Since there was no intentional effort to avoid *Miranda*, this Court's precedents appear to dictate that "[t]he admissibility of [Farris's] postwarning statements should continue to be governed by the principles of *Elstad*." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in judgment). Justice Kennedy's opinion is this Court's holding because it is the narrowest opinion concurring in the judgment in a case where there was no majority opinion. *Marks*, 430 U.S. 188, 193.

3. The Supreme Court of Ohio ignored this Court's holding and stated:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. *Farris*, 109 Ohio St.3d 519 {¶20}. Pet. App. 7a. See also, *Farris*, 109 Ohio St.3d 519, {¶21} (Post warning statements are inadmissable if the warning is not effective.) Pet. App. 7a - 8a.

The Supreme Court of Ohio synthesized this "threshold issue" from the plurality's opinion in *Siebert*. See, *Farris*, 109 Ohio St.3d 519 {¶20}, citing, *Seibert*, 542 U.S. at 611 - 612; *Farris*, 109 Ohio St.3d 519 {¶21}, citing, *Seibert*, 542 U.S. at 612, fn. 4; *Farris*, 109 Ohio St.3d 519 {¶27 - 29}, citing, *Seibert*, 542 U.S. at 615 - 617; *Farris*, 109 Ohio St.3d 519 {¶30}, citing, *Seibert*, 542 U.S. at 612, 616 - 617. Pet. App. 7a - 12a. It then applied the *Seibert*

plurality's factors to Farris's case, and suppressed the statements. *Farris*, 109 Ohio St.3d 519, {¶¶30, 36}. Pet. App. 12a, 14a.

4. In *Seibert*, this Court held that the admissibility of Ferris's statements should be governed by *Elstad* unless there was a deliberate two-step strategy employed to avoid *Miranda*. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in judgment). In this case the Supreme Court of Ohio specifically stated that there was no intentional action to avoid *Miranda*. *Farris*, 109 Ohio St.3d 519, {¶31}. Pet App. 12a - 13a. Therefore, under federal law, the effectiveness of the warning is not the "relevant analysis" described by the Supreme Courts of Ohio, Vermont, and Louisiana. Instead, the Supreme Court of Ohio should have applied *Elsted*.

5. In *Elsted*, this Court stated,

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. *Elsted*, 470 U.S. at 314.

Since there was no deliberately coercive or improper tactics in obtaining Farris's initial statement,"[t]he relevant inquire is whether, in fact, the second statement was also voluntarily made." *Elsted*, 470 U.S. at 318. In making this inquiry "[t]he fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative." *Elsted*, 470 U.S. at 318.

The trial court found that before Farris made the second set of statements "full Miranda rights were given and voluntarily waived." Pet. App. 36a. The Court of Appeals agreed. *Farris*, 2004-Ohio-826 {¶ 14}("Defendant's

acts indicate that he voluntarily, knowingly, and intelligently waived his Miranda rights."). Pet. App. 30a.

Farris's second statement was voluntarily made. Therefore, when applying federal law, under the test announced in *Elsted*, and affirmed in *Siebert*, the Supreme Court of Ohio, was required to affirm the decisions of the trial and intermediary appellate courts. The Supreme Court of Ohio's decision to change that result was based on its inappropriate application of *Seibert*.

6. When applying federal law, the Supreme Court of Ohio has no authority to overrule or ignore decisions of this Court. *Khan*, 522 U.S. at 20 ("[I]t is this Court's prerogative alone to overrule one of its precedents."). This Court's "principal responsibility under current practice..., and a primary basis for the Constitution's allowing [this Court] to be accorded jurisdiction to review state-court decisions, ..., is to ensure the integrity and uniformity of federal law." *Marsh*, 126 S.Ct. at 2530, (Scalia, J., concurring).

By applying an opinion that was not the holding of the Court, and treating it as federal law, the Supreme Court of Ohio has misapplied or effectively overruled a decision of this Court regarding federal law in Ohio. In doing so it invalidated the proper state action taken by Trooper Menges. "Turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each state Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt." *Marsh*, 126 S.Ct. at 2531, (Scalia, J., concurring).

The Supreme Court of Ohio was clearly confused by the *Seibert* decision. The decision of the Supreme Court of Ohio highlighted the split among courts on the application

of *Seibert*, misapplied and effectively overturned in Ohio a decision of this Court, resulted in the inappropriate suppression of evidence, and was the most recent in a string of developing case law misinterpreting this Court's decision in *Seibert*. This Court should grant review to finally and clearly hold that when police officers like Trooper Menges do not use a deliberate strategy to avoid *Miranda*, courts should continue to apply *Elsted* to determine if post-*Miranda* statements are inadmissable because of pre-*Miranda* questioning.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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October 2, 2006

THE STATE OF OHIO, APPELLEE, v. FARRIS, APPELLANT.

[Cite as *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255.]

Criminal law — Search and seizure — Traffic stop — Incriminating statements made by defendant after Miranda *warnings confirming statements made before warnings are inadmissible — Physical evidence seized as a result of inadmissible statements is also inadmissible — Odor of marijuana gave rise to probable cause for warrantless search of interior of vehicle but not its trunk.*

(No. 2004-0604 – Submitted April 27, 2005 – Decided July 12, 2006.)

APPEAL from the Court of Appeals for Wayne County, No. 03CA0022, 2004-Ohio-826.

PFEIFER, J.

Factual and Procedural Background

{¶ 1} On the afternoon of December 18, 2002, Ohio Highway Patrol Trooper Richard Menges stopped appellant, Stephen F. Farris, for speeding on U.S. Route 30, in Wooster. Once Farris pulled over and stopped his vehicle, Menges approached on the right side of the car. When Farris lowered the passenger window, Menges smelled a light odor of burnt marijuana coming from inside the car. Menges had not observed Farris smoking, nor did he see him throw anything out a window.

{¶ 2} Menges asked Farris to step out of the car. He did not conduct a field sobriety test on Farris, but did conduct a pat-down search and found no evidence of contraband or drugs. Menges took Farris's car keys and

requested that Farris sit in the front seat of the police cruiser.

{¶ 3} While they were seated in the front of the cruiser, Menges told Farris that he had smelled marijuana in the car. Without administering a *Miranda* warning or seeking consent to search the car, Menges asked Farris about the smell of marijuana. Farris told Menges that his housemates had been smoking marijuana when he left the house. Menges told Farris that he was going to search the car and then specifically asked whether there were any drugs or drug devices in the car. Farris admitted that there was a "bowl," i.e., a marijuana pipe, in a bag in his trunk.

{¶ 4} Menges testified that after Farris made those statements, Menges immediately administered *Miranda* warnings, but did not tell Farris that his previous admissions could not be used against him. He then asked Farris the same questions and obtained the same responses regarding the location of the drug paraphernalia.

{¶ 5} Menges and a second trooper searched the interior of Farris's vehicle and found nothing. They then opened the trunk, searched it, and seized a closed, opaque container that held a glass pipe and cigarette papers. Farris was charged with a misdemeanor for possession of drug paraphernalia.

{¶ 6} Farris filed a motion to suppress certain statements that he had made to the highway patrol troopers and to suppress the evidence seized from the trunk of his car. On April 29, 2003, the trial court ruled that statements made prior to the *Miranda* warnings were to be suppressed but that statements made after the warnings were admissible. The trial court also ruled that the seized paraphernalia was admissible, as the trooper had probable cause to search the trunk of Farris's vehicle based solely on

the odor of burnt marijuana coming from inside the car.

{¶ 7} After the trial court's evidentiary rulings, Farris entered a no-contest plea, and the trial court entered a judgment of conviction. Farris appealed, and the appellate court affirmed the trial court's holding. The appellate court held that Farris's statements – both before and after the *Miranda* warning – were voluntary and that once warned, he knowingly and intelligently waived his *Miranda* rights. The court further held that the search of the vehicle's trunk was proper because Farris's "admissible inculpatory statements relating to the drug paraphernalia gave the officer probable cause to search the trunk of [Farris's] vehicle without a warrant pursuant to the automobile exception."

{¶ 8} The cause is before this court upon the acceptance of a discretionary appeal.

Law and Analysis

{¶ 9} This case presents several issues for our review: (1) whether the detention of Farris constituted an unreasonable seizure and thus violated the Fourth Amendment to the United States Constitution, (2) whether Farris was in custody when he made his pre-*Miranda* statements in the police vehicle, (3) whether the statements Farris made after receiving a *Miranda* warning confirming his pre-*Miranda* statements can be used against him, (4) whether the fruits of Farris's post-*Miranda* statements are admissible, and (5) whether the above issues are irrelevant in this matter because an officer has probable cause to search an entire vehicle, including its trunk, when he smells the odor of burnt marijuana coming from the vehicle. We hold that Farris was not unreasonably detained; that he was, however, in custody; that his post-*Miranda* statements are inadmissible; that the physical evidence seized as a

result of his statements is inadmissible pursuant to the Self-Incrimination Clause of Section 10, Article I of the Ohio Constitution; and that with respect to the car, the officer had sufficient probable cause to search only the interior of the vehicle, not its trunk.

{¶ 10} Appellant argues first that he was being illegally held by Officer Menges when he made his incriminating statements. In *State v. Robinette* (1997), 80 Ohio St.3d 234, 685 N.E.2d 762, this court held in paragraph one of the syllabus:

> **{¶ 11}** "When a police officer's objective justification to continue detention of a person stopped for a traffic violation for the purpose of searching the person's vehicle is not related to the purpose of the original stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention, the continued detention to conduct a search constitutes an illegal seizure."

{¶ 12} Here, Farris's extended detention was not based upon the purpose of the original stop, excessive speed, but was based upon Menges's detection of the scent of burnt marijuana. In *State v. Moore* (2000), 90 Ohio St.3d 47, 734 N.E.2d 804, a case involving the search of a driver and his car pursuant to a traffic stop, this court held, "The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle" without a warrant. Based on *Moore*, then, Farris's detention in order to effectuate a search was justified and did not violate the Fourth Amendment to the United States Constitution or its Ohio counterpart, Section 14, Article I of the Ohio Constitution.

{¶ 13} Having conceded below and in its memorandum opposing jurisdiction in this court that Farris was in custody for purposes of *Miranda*, appellee now argues that Farris was never in custody, rendering *Miranda* warnings unnecessary. A defendant need not be under arrest, however, to be "in custody" for *Miranda* purposes. Although a motorist who is temporarily detained as the subject of an ordinary traffic stop is not "in custody" for the purposes of *Miranda*, *Berkemer v. McCarty* (1984), 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317, if that person "thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." Id.

{¶ 14} Here, the officer's treatment of Farris after the original traffic stop placed Farris in custody for practical purposes. Officer Menges patted down Farris, took his car keys, instructed him to enter the cruiser, and told Farris that he was going to search Farris's car because of the scent of marijuana. Farris was not free to leave the scene – he had no car keys and reasonably believed that he would be detained at least as long as it would take for the officer to search his automobile. The "only relevant inquiry" in determining whether a person is in custody is "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442, 104 S.Ct. 3138, 82 L.Ed.2d 317. We hold that a reasonable man in Farris's position would have understood himself to be in custody of a police officer as he sat in the cruiser.

{¶ 15} While in custody in the cruiser, Farris made virtually identical statements to Menges before and after Menges's recitation of the *Miranda* warning regarding the presence of drug paraphernalia in the trunk of his car. In *Missouri v. Seibert* (2004), 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643, the United States Supreme Court considered whether the technique of successive interrogations, first

unwarned and then warned, violates a defendant's *Miranda* rights.

{¶ 16} In *Seibert*, an officer purposely and by design questioned a defendant without *Miranda* warnings for 30 to 40 minutes. After the defendant made an admission, the officer gave the defendant a 20-minute break. After the break, the same officer gave the defendant *Miranda* warnings, obtained a signed waiver, and resumed questioning, confronting the defendant with her prewarning statements. The defendant repeated her admission. The court referred to this interrogation technique as "question first" and wrote that "[t]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Id. at 611, 124 S.Ct. 2601, 159 L.Ed.2d 643. The court held that the postwarning statements were inadmissible. Id. at 617, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643. Id. at 611, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 17} The overarching concern when considering the sufficiency of a *Miranda* warning is whether it is given in a manner that effectuates its purpose of reasonably informing a defendant of his rights. The words themselves are not magical and are not curative of interrogation mistakes that occur before it is given:

> **{¶ 18}** "Just as 'no talismanic incantation [is] required to satisfy *[Miranda*'s] strictures,' *California v. Prysock*, 453 U.S. 355, 359 [101 S.Ct. 2806, 69 L.Ed.2d 696] (1981) *(per curiam)*, it would be absurd to think that the mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. 'The inquiry is simply whether the warnings reasonably

> "conve[y] to [a suspect] his rights as required by *Miranda*." ' *Duckworth v. Eagan*, 492 U.S. 195, 203 [109 S.Ct. 2875, 106 L.Ed.2d 166] (1989) (quoting *Prysock*, *supra*, at 361 [101 S.Ct. 2806, 69 L.Ed.2d 696])." *Seibert*, 542 U.S. at 611, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 19} In a question-first scenario in which the *Miranda* warning is withheld and the suspect makes inculpatory statements, the risk is that the warning will mean less when it is eventually recited:

> **{¶ 20}** "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment." *Seibert*, 542 U.S. at 611-612, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 21} *Seibert* points out that in "question first" scenarios when the circumstances of the given case show that the *Miranda* warning could not reasonably be found effective, the postwarning statements are inadmissible

because "the earlier and later statements are realistically seen as parts of a single, unwarned sequence of questioning." Id. at 612, 124 S.Ct. 2601, 159 L.Ed.2d 643, fn. 4. The court clearly rejected the "fruit of the poisonous tree" doctrine as a basis for exclusion. That doctrine holds that "evidence otherwise admissible but discovered as a result of an earlier violation [of Fourth Amendment rights] is excluded as tainted." Id.

{¶ 22} In rejecting the "fruit of the poisonous tree" doctrine for *Miranda* violations, the court relied on its earlier decision in *Oregon v. Elstad* (1985), 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222. *Seibert*, 542 U.S. at 612, 124 S.Ct. 2601, 159 L.Ed.2d 643, fn.4. The court in *Elstad* held admissible a post-*Miranda* warning confession that followed a prewarning admission solicited by an officer while the suspect was in custody. *Elstad* and *Seibert* stand on opposite sides of the line defining where prewarning statements irretrievably affect postwarning statements. Still, that line cannot be said to be bright or sharply defined.

{¶ 23} In *Elstad*, police officers went to the home of the 18-year-old defendant with a warrant for his arrest. While one officer went to the kitchen to explain to the suspect's mother that her son was being arrested for the burglary of a neighbor's residence, another officer stayed with Elstad in the living room and had a brief discussion with him. The officer explained that the neighbor's house had been robbed and that he thought Elstad was involved. Elstad stated to the officer, "Yes, I was there." *Elstad*, 470 U.S. at 301, 105 S.Ct. 1285, 84 L.Ed.2d 222.

{¶ 24} The officers then transported Elstad to the sheriff's department, and about one hour later, interviewed him in the office of one of the officers. One officer advised Elstad for the first time of his *Miranda* rights, reading from

a standard card, without mentioning Elstad's previous statement. Elstad waived his rights and then made a full, detailed statement, explaining that he had known that the neighbors would be out of town and that he had been paid to help several people gain entry through a defective sliding glass door. He added that upon leaving the house, he received a "bag of grass" from another person involved in the robbery.

{¶ 25} An Oregon appellate court held the postwarning confession inadmissible. The *Elstad* court reversed. The court rejected the idea that a confession following an earlier, unwarned statement is inadmissible as "fruit of the poisonous tree." The court explained that evidence can be excluded as fruit of the poisonous tree only after a constitutional violation and that a failure to give *Miranda* warnings is not equivalent to a violation of the Constitution: " 'The prophylactic *Miranda* warnings * * * are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan v. Tucker*, 417 U.S. 433, 444, 94 S.Ct. 2357, 2364, 41 L.Ed.2d 182 (1974); see *Edwards v. Arizona*, 451 U.S. 477, 492, 101 S.Ct. 1880, 1888, 68 L.Ed.2d 378 (1981) (Powell, J., concurring). Requiring *Miranda* warnings before custodial interrogation provides "practical reinforcement" for the Fifth Amendment right.' " (Footnote omitted.) *Elstad*, 470 U.S. at 305, 105 S.Ct. 1285, 84 L.Ed.2d 222, quoting *New York v. Quarles* (1984), 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed.2d 550.

{¶ 26} The court in *Elstad* also rejected the defendant's "cat out of the bag" argument, that after an unwarned statement of guilt, there exists a "subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate." *Elstad*, 470 U.S.

at 311, 105 S.Ct. 1285, 84 L.Ed.2d 222. The court wrote that "[t]his Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." Id. at 312, 105 S.Ct. 1285, 84 L.Ed.2d 222.

{¶ 27} *Seibert* followed *Elstad* in rejecting a "fruit of the poisonous tree" analysis or "cat out of the bag" analysis. Instead, *Seibert* considers whether the sequential interrogations are essentially one continuous interrogation and whether an intermediate *Miranda* warning can be effective. Together with *Elstad*, *Seibert* establishes factors to consider in making the decision:

> {¶ 28} "The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow

up on the earlier admission.

{¶ 29} "At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way [the officer] set the scene by saying 'we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?' * * * The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already

> given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 615-617, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 30} Applying the elements discussed in *Seibert* to the facts of this case, we hold that the interrogation here is much closer to *Seibert* than to *Elstad*. Here, although the whole process was extremely brief, "[i]t would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." *Seibert*, 542 U.S. at 616-617, 124 S.Ct. 2601, 159 L.Ed.2d 643. Although the questioning was very simple, not in-depth, and not lengthy, it covered exactly the same subject both before the warning and after the warning. Both of Farris's statements were made in the police cruiser to the same police officer within moments of each other. Temporally and substantively, Menges's questioning of Farris constituted a single interrogation. Menges made no attempt to tailor the *Miranda* warning he eventually gave to the particular situation and did not convey any distinction whatsoever between statements that might come after the warning and those that came before. Thus, Farris was not in a position to make a *Seibert* informed choice. Id. at 612, 124 S.Ct. 2601, 159 L.Ed.2d 643.

{¶ 31} A difference between this case and *Seibert* is

the seeming lack of an official police strategy to intentionally bait suspects into talking before the *Miranda* warning and then repeating damaging statements later after the warning has been given. *Seibert* was a plurality opinion, leaving somewhat in doubt whether the intent of the officer in garnering the prewarning statement is important in determining whether a postwarning statement is admissible. Concurring in the judgment, Justice Kennedy wrote:

> **{¶ 32}** "The plurality concludes that whenever a two-stage interview occurs, admissibility of the postwarning statement should depend on 'whether the *Miranda* warnings delivered midstream could have been effective enough to accomplish their object' given the specific facts of the case. * * * This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations. * * * In my view, this test cuts too broadly." *Seibert*, 542 U.S. at 621-622, 124 S.Ct. 2601, 159 L.Ed.2d 643 (Kennedy, J., concurring in judgment).

{¶ 33} However, in a dissent joined by Chief Justice Rehnquist and Justices Scalia and Thomas, Justice O'Connor wrote:

> **{¶ 34}** "The plurality's rejection of an intent-based test is * * *, in my view, correct. Freedom from compulsion lies at the heart of the Fifth Amendment, and requires us to assess whether a suspect's decision to speak truly was voluntary. Because voluntariness is a matter of the suspect's state of mind, we

> focus our analysis on the way in which suspects experience interrogation. * * * "Thoughts kept inside a police officer's head cannot affect that experience."*Seibert,* 542 U.S. at 624, 124 S.Ct. 2601, 159 L.Ed.2d 643 (O'Connor, J., dissenting).

{¶ 35} We agree with the *Seibert* plurality and dissent that the intent of the officer doing the questioning is not relevant in a *Miranda* analysis. The suspect's state of mind is the key. To delve into the issue of whether the two-stage questioning was an intentional attempt to undermine *Miranda* complicates matters so much that it could muddy a clear and effective rule. *(Seibert* presented the rare case in which the officer admitted that the two-part questioning was intentionally coercive.) *Miranda* itself provides a bright line for police behavior, and we believe that a bright line is also necessary in these types of cases.

{¶ 36} Because the intent of the trooper was irrelevant here, and because Farris's postwarning statements were the same as his prewarning statements, we hold that Farris's postwarning statements were not the result of an informed choice and are therefore inadmissible.

{¶ 37} Although we have held that Farris's statements to Menges are inadmissible, we still must determine whether the physical evidence found as a result of his statements is also inadmissible. In *United States v. Patane* (2004), 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667, the court considered whether the failure to give a suspect a *Miranda* warning requires the suppression of the physical fruits of the suspect's unwarned but voluntary statements. The court concluded that the *Miranda* rule protects against violations of the Fifth Amendment's Self-Incrimination Clause, but does not apply to nontestimonial physical evidence.

{¶ 38} In *Patane*, the defendant was suspected of violating a restraining order. Police also suspected that the defendant, a convicted felon, might be in possession of a firearm. Officers arrested Patane at his home for violation of the restraining order; a detective started to advise Patane of his *Miranda* rights, but was interrupted by Patane, who said that he knew his rights. The officers never resumed the warning. The detective then asked Patane about the handgun he was suspected to have. Eventually, Patane told the detective that the pistol was in his bedroom and gave the detective permission to retrieve it. Patane was indicted for possession of a firearm by a convicted felon. Patane sought to have the gun suppressed as the fruit of an unwarned statement.

{¶ 39} The court wrote that "the core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial. * * * The Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements." Id. at 637, 124 S.Ct. 2620, 159 L.Ed.2d 667. The court reiterated the court's rejection in *Elstad* and *Seibert* of the "fruit of the poisonous tree" doctrine in cases involving violations of the *Miranda* rule:

{¶ 40} "[J]ust as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in such cases as *Wong Sun [v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, which established the "fruit of the poisonous tree" doctrine] does not apply." *Patane*, 542 U.S. at 637, 124 S.Ct. 2620, 159 L.Ed.2d 667.

{¶ 41} The court held that violations of *Miranda*

occur only at trial and only as to statements:

> {¶ 42} "Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, '[t]he exclusion of unwarned statements * * * is a complete and sufficient remedy' for any perceived *Miranda* violation." *Patane*, 542 U.S. at 642, 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667, quoting *Chavez v. Martinez* (2003), 538 U.S. 760, 790, 123 S.Ct. 1994, 155 L.Ed.2d 984.

{¶ 43} The court rejected the argument that physical evidence seized as a result of an unwarned statement is the practical equivalent of a statement:

> {¶ 44} "[W]e have held that '[t]he word "witness" in the constitutional text limits the' scope of the Self-Incrimination Clause to testimonial evidence. *[United States v.] Hubbell* [2000], 530 U.S. [27] at 34-35, 120 S.Ct. 2037 [147 L.Ed.2d 24]. The Constitution itself makes the distinction. And although it is true that the court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination." (Footnote omitted.) *Patane*, 542 U.S. at 643-644, 124 S.Ct. 2620, 159 L.Ed.2d 667.

{¶ 45} Pursuant to the Fifth Amendment, then, the physical evidence seized by the troopers in this case was

admissible. We must now consider whether the evidence was admissible pursuant to Section 10, Article I of the Ohio Constitution.

{¶ 46} The Ohio Constitution[:]

> "is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups." *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, paragraph one of the syllabus.

{¶ 47} In general, when provisions of the Ohio Constitution and United States Constitution are essentially identical, we should harmonize our interpretations of the provisions, unless there are persuasive reasons to do otherwise. *State v. Robinette*, 80 Ohio St.3d at 239, 685 N.E.2d 762. In *State v.Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, syllabus, this court diverged from federal Fourth Amendment jurisprudence, holding that "Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors."

{¶ 48} To hold that the physical evidence seized as a result of unwarned statements is inadmissible, we would have to hold that Section 10, Article I of the Ohio

Constitution provides greater protection to criminal defendants than the Fifth Amendment to the United States Constitution. We so find here.

{¶ 49} Only evidence obtained as the direct result of statements made in custody without the benefit of a *Miranda* warning should be excluded. We believe that to hold otherwise would encourage law-enforcement officers to withhold *Miranda* warnings and would thus weaken Section 10, Article I of the Ohio Constitution. In cases like this one, where possession is the basis for the crime and physical evidence is the keystone of the case, warning suspects of their rights can hinder the gathering of evidence. When physical evidence is central to a conviction and testimonial evidence is not, there can arise a virtual incentive to flout *Miranda*. We believe that the overall administration of justice in Ohio requires a law-enforcement environment in which evidence is gathered in conjunction with *Miranda*, not in defiance of it. We thus join the other states that have already determined after *Patane* that their state constitutions' protections against self-incrimination extend to physical evidence seized as a result of pre-*Miranda* statements. *State v. Knapp* (2005), 285 Wis.2d 86, 700 N.W.2d 899; *Commonwealth v. Martin* (2005), 444 Mass. 213, 827 N.E.2d 198. Thus, the physical evidence obtained as a result of the unwarned statements made by Farris in this case is inadmissible pursuant to Section 10, Article I of the Ohio Constitution.

{¶ 50} Finally, the appellee argues that, even without Farris's statements, Menges had probable cause to believe that the car contained contraband due to his detection of the scent of marijuana and that the automobile exception to the warrant requirement permitted him to search the vehicle. See *Chambers v. Maroney* (1970), 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419. However, the items seized are admissible only if Menges had the authority to

search the *trunk* of Farris's vehicle and its contents based upon the scent of marijuana. This court did not extend the search of the vehicle to the trunk in *Moore*, 90 Ohio St.3d 47, 734 N.E.2d 804, and we decline to do so here.

{¶ 51} A trunk and a passenger compartment of an automobile are subject to different standards of probable cause to conduct searches. In *State v. Murrell* (2002), 94 Ohio St.3d 489, 764 N.E.2d 986, syllabus, this court held that "[w]hen a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the *passenger compartment* of that automobile." (Emphasis added.) The court was conspicuous in limiting the search to the passenger compartment.

{¶ 52} The odor of burnt marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause for a warrantless search of the trunk of the vehicle. *United States v. Nielsen* (C.A.10, 1993), 9 F.3d 1487. No other factors justifying a search beyond the passenger compartment were present in this case. The officer detected only a light odor of marijuana, and the troopers found no other contraband within the passenger compartment. The troopers thus lacked probable cause to search the trunk of Farris's vehicle. Therefore, the automobile exception does not apply in this case.

{¶ 53} Accordingly, we reverse the judgment of the court of appeals.

Judgment reversed.

MOYER, C.J., O'CONNOR and LANZINGER, JJ., concur.

RESNICK, LUNDBERG STRATTON and O'DONNELL, JJ., concur in part and dissent in part.

ALICE ROBIE RESNICK, J., concurring in part and dissenting in part.

{¶ 54} I concur with the majority's finding that the appellant, Stephen F. Farris, was not unreasonably detained, that he was in custody when he made his pre-*Miranda* statements, and that his post-*Miranda* statements are inadmissible. However, I strongly disagree with the majority's determination that the physical evidence seized from the appellant's trunk is inadmissible pursuant to Section 10, Article I of the Ohio Constitution, and its determination that the physical evidence is inadmissible because the officer had sufficient probable cause to search only the interior of the vehicle.

{¶ 55} The majority first concludes that the physical evidence is inadmissible pursuant to Section 10, Article I of the Ohio Constitution. In reaching this holding, the majority concludes that Section 10, Article I of the Ohio Constitution provides greater protection to criminal defendants than the Fifth Amendment to the United States Constitution. We need not and should not make such a finding in this case. Rather, the admissibility of the physical evidence turns not on the determination of a *Miranda* violation, but on the examination of the law relating to searches of vehicles pursuant to the automobile exception to the warrant requirement.

{¶ 56} Under the Fourth Amendment, searches conducted without prior approval by a judge or a magistrate are per se unreasonable, subject to certain established and well-delineated exceptions. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. One of these, the automobile exception, was set forth in *Carroll v. United States* (1925), 267 U.S 132, 45 S.Ct. 280, 69 L.Ed. 543. In

Carroll, the United States Supreme Court held that a warrantless search of an automobile stopped by law enforcement officers who had probable cause to believe the vehicle contained contraband was not unreasonable under the Fourth Amendment. 267 U.S. at 155-156, 45 S.Ct. 280, 69 L.Ed. 543.

{¶ 57} The court again reviewed the automobile exception to the warrant requirement and specifically addressed the scope of the search in the case of *United States v. Ross* (1982), 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572. In that case, the court held that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." (Emphasis omitted.) Id. at 825, 102 S.Ct. 2157, 72 L.Ed.2d 572.

{¶ 58} We have expressly interpreted Section 14, Article I of the Ohio Constitution as affording the same protections as the Fourth Amendment to the United States Constitution. *State v. Robinette* (1997), 80 Ohio St.3d 234, 238, 685 N.E.2d 762. In fact, this court has ruled that we should harmonize the Fourth Amendment and Section 14, Article I of the Ohio Constitution. *State v. Murrell* (2002), 94 Ohio St.3d 489, 496, 764 N.E.2d 986.

{¶ 59} This court has held that "the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle, pursuant to the automobile exception to the warrant requirement." *State v. Moore* (2000), 90 Ohio St.3d 47, 48, 734 N.E.2d 804. In terms of the permissible scope of a warrantless search of a vehicle pursuant to the automobile exception, we held that "[w]here police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle

and its contents, including all movable containers and packages, that may logically conceal the object of the search. *(United States v. Ross* [1982], 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572[,] followed.)" *State v. Welch* (1985), 18 Ohio St.3d 88, 18 OBR 124, 480 N.E.2d 384, syllabus.

{¶ 60} Despite this clear precedent, the majority concludes that the officer in the present case had sufficient probable cause to search only the interior of the vehicle, not its trunk. Inexplicably, the majority determines that the automobile exception does not apply in this case because no factors beyond the smell of burnt marijuana justified a search beyond the passenger compartment of the appellant's vehicle.

{¶ 61} The majority's decision in this case leaves the law on warrantless searches of vehicles seriously muddled. Although the majority holds that the scope of the search of the appellant's vehicle was limited to the passenger compartment, it fails to delineate which exception to the warrant requirement it believes justifies the warrantless search of the appellant's vehicle. In determining that the automobile exception to the warrant requirement does not apply, the majority asserts that our decision in *State v. Moore*, which allowed the search of an automobile without a warrant based upon an officer's recognition of the smell of marijuana, limited the scope of the warrantless search of the appellant's vehicle in this case to the interior of the vehicle. The majority also claims that our decision in *State v. Murrell*, which addressed the search-incident-to-arrest exception to the warrant requirement, supports its conclusion that the scope of the warrantless search of the appellant's vehicle was limited to the passenger compartment of the vehicle.

{¶ 62} Our precedent makes clear that the smell of marijuana alone, by a person qualified to recognize the odor,

is sufficient to establish probable cause to search an automobile pursuant to the automobile exception to the warrant requirement. *State v. Moore*, 90 Ohio St.3d at 48, 734 N.E.2d 804. We did not limit the scope of the search in *Moore* to the interior of the vehicle. Therefore, it is unquestionable that when the officer in this case smelled the odor of burnt marijuana coming from the appellant's vehicle, he had sufficient probable cause to search the automobile, including the trunk, pursuant to the automobile exception to the warrant requirement.

{¶ 63} Accordingly, I would affirm the appellate court's holding that the physical evidence seized from the appellant's trunk is admissible.

LUNDBERG STRATTON and O'DONNELL, JJ., concur in the foregoing opinion.

Martin Frantz, Wayne County Prosecuting Attorney, for appellee.

Robert E. Kerper Jr., for appellant.

STATE OF OHIO	)	IN THE COURT
	)ss:	OF APPEALS
COUNTY OF WAYNE	)	NINTH JUDICIAL
	)	DISTRICT

STATE OF OHIO

Appellee

v.

STEPHEN F. FARRIS

Appellant

C.A. No. 03CA0022

APPEAL FROM JUDGMENT
ENTERED IN THE
WAYNE COUNTY MUNICIPAL COURT
COUNTY OF WAYNE, OHIO
CASE No. CRB 02-12-0101

DECISION AND JOURNAL ENTRY

Dated: February 25, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Slaby, Judge.

{¶1} Defendant, Stephen F. Farris, appeals from the judgment of the Wayne County Municipal Court finding him guilty of possession of drug paraphernalia and sentencing him to a $150 fine and 6 month suspension of his driver's license. We affirm.

{¶2} A police officer stopped Defendant for speeding. The officer approached Defendant's vehicle, and noted that when Defendant rolled down his driver's side window a light odor of burnt marijuana emanated from the passenger compartment. The officer asked Defendant to exit his vehicle, performed a pat-down search on Defendant, took Defendant's car keys, and escorted Defendant to his patrol car where he ordered Defendant to sit in the passenger seat. Without giving Defendant any Miranda warnings, the officer asked him whether there were any drugs or drug paraphernalia in the vehicle. Defendant admitted that his trunk contained a glass marijuana pipe and cigarette papers.

{¶3} The officer then immediately gave Defendant his Miranda warnings and repeated the questions. Defendant, again, admitted that he had drug paraphernalia in his trunk. The officer, along with a second officer who had arrived on the scene, then proceeded to search both the interior and trunk of Defendant's vehicle after placing Defendant in the back of the patrol car. The officer discovered the glass pipe, which tested positive for marijuana residue, and cigarette papers in an opaque box in Defendant's trunk.

{¶4} Defendant was charged with possession of drug paraphernalia. Defendant filed a motion to suppress on April 18, 2003. In response, the trial court ordered Defendant and the State to brief two issues prior to trial: whether inculpatory statements made by Defendant were admissible and whether the police officer had probable cause to search the trunk of Defendant's vehicle. On April 28, 2003, the court found that Defendant was in custody when he made inculpatory statements. Therefore, the court suppressed the inculpatory statements made prior to receipt of Miranda warnings, but ruled that identical statements, made by Defendant after receiving the required warnings, were admissible. The court also found that the police officer

had probable cause to search the trunk of Defendant's vehicle based on the odor of burnt marijuana in the passenger compartment of the vehicle.

{¶5} Following the court's rulings, Defendant pleaded no contest to possession of drug paraphernalia. The court sentenced Defendant to pay $150 in fines and suspended Defendant's driver's license for six months. The trial court stayed execution of the sentence pending appeal. Defendant timely appealed, raising two assignments of error.

ASSIGNMENT OF ERROR I

> "The trial court erred in denying [Defendant's] pretrial motion to suppress inculpatory statements made to the Ohio State Highway Patrol."

{¶6} In his first assignment of error, Defendant argues that the trial court erred by failing to suppress inculpatory statements made by Defendant to the police. Specifically, Defendant alleges that the second set of inculpatory statements, given after Miranda warnings, were inexorably intertwined and tainted by the immediacy of his prior non-Mirandized inculpatory statements and illegal arrest. He also asserts that the court should have suppressed the statements because he did not voluntarily and knowingly waive his rights, and the police did not obtain any written waiver. We disagree.

{¶7} The review of a motion to suppress presents a mixed question of fact and law for an appellate court. *State v. Yeager*, 9th Dist. Nos. 21091, 21112, and 21120, 2003-Ohio-1808, at ¶5, citing *State v. Long* (1998), 127 Ohio App.3d 328, 332. This court "'is bound to accept factual determinations of the trial court made during the

suppression hearing so long as they are supported by competent and credible evidence.'" *State v. Robinson* (Oct. 25, 2000), 9th Dist. No. 19905, at 5, quoting *State v. Searls* (1997), 118 Ohio App.3d 739, 741. However, an appellate court reviews de novo the trial court's application of the law to those facts. *Robinson*, supra, at 5, citing *Searls*, 118 Ohio App.3d at 741.

{¶8} This court initially notes that Defendant in this case was never arrested. The officer neither had the intent to arrest Defendant, nor did he tell Defendant he was under arrest. Rather, the officer merely cited and released Defendant. Defendant, therefore, was never under arrest. See *State v. Darrah* (1980), 64 Ohio St.2d 22, 26. As such, the Fourth Amendment "fruit of the poisonous tree" doctrine, which applies to statements made by a defendant following an illegal arrest, does not apply. See *Brown v. Illinois* (1975), 422 U.S. 590, 45 L.Ed.2d 416 (statements excluded as fruit of an illegal arrest); *Wong Sun v. United States* (1963), 371 U.S. 471, 9 L.Ed.2d 441 (same).

{¶9} *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 16 L.Ed.2d 694, protects a defendant's Fifth Amendment right against self-incrimination by prohibiting admission of inculpatory statements resulting from custodial interrogation unless law enforcement officers have followed enumerated procedural safeguards. Prior to custodial interrogation, a defendant must be informed that he has the right to remain silent, any statement he makes may be used as evidence against him, and he has the right to the presence of an attorney. Id. We must answer two questions in determining whether Defendant's inculpatory statements made following the Miranda warnings are admissible: whether Defendant's inculpatory statements were voluntary, and whether Defendant voluntarily, knowingly, and intelligently waived his Miranda rights. See *State v. Clark* (1988), 38 Ohio St.3d 252, 261.

{¶10} In determining whether a statement was voluntary, the court considers the totality of the circumstances. *Clark*, 38 Ohio St.3d at 261. Factors under this test may include "the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards* (1976), 49 Ohio St.2d 31, 40-41, citing *Brown v. United States* (C.A.10, 1966), 356 F.2d 230, 232. Generally speaking, for an inculpatory statement made after valid Miranda warnings to be considered involuntary, law enforcement officers must have engaged in some form of coercive action. *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 93 L.Ed.2d 473.

{¶11} In this particular case, Defendant, a 21 year old college student with no prior criminal history, was asked a single question by a police officer during a brief traffic stop. The officer did not threaten Defendant or offer Defendant inducements to answer his question, nor did he mistreat Defendant. No evidence of physical deprivation has been offered. The officer exercised no overt coercion upon Defendant beyond the facts that Defendant was seated in the front seat of the police cruiser and that the officer had Defendant's keys. Defendant's first statements were voluntary.

{¶12} Likewise, Defendant's second set of inculpatory statements, given following the Miranda warnings, were voluntary. Defendant, again, was under no coercion to answer the officer the second time. The officer did not threaten Defendant or offer him inducements to answer, nor did the officer mistreat or physically deprive Defendant of anything. While Defendant argues that his prior unwarned confession defeats the voluntariness of his second set of Mirandized statements, this court has held

that:

> the mere fact that a defendant has made an unwarned confession does not raise the presumption that the unwarned confession was involuntary or that it tainted the admissibility of subsequent warned confessions. Thus, although a defendant's prior unwarned confession is inadmissible because of the failure to provide Miranda warnings, the administration of Miranda warnings before a subsequent confession 'ordinarily should suffice to remove the conditions that precluded admission of the earlier [confession].' (internal citations and emphasis omitted). *In re Taylor* (Mar. 29, 1995), 9th Dist. No. 93CA005650, at 11-12, citing and quoting *Oregon v. Elstad* (1985), 470 U.S. 298, 314, 318, 84 L.Ed.2d 222. See, also, *State v. McMillan* (1990), 69 Ohio App.3d 36, 40-41.

We find that Defendant's prior unwarned statements do not, by themselves, render his second set of inculpatory statements involuntary.

{¶13} Given that both sets of Defendant's inculpatory statements were voluntary, the question remains whether Defendant voluntarily, knowingly, and intelligently waived his Miranda rights. Where the prosecution alleges that a defendant has waived his Miranda rights, it must prove, by a preponderance of the evidence, that the defendant knowingly, voluntarily, and intelligently waived those rights based on the totality of the circumstances. See *State v. Gumm*, 73 Ohio St.3d 413, 429, 1995-Ohio-24. While an express or written statement of waiver may be preferable in Miranda cases, neither is required in order to find a valid

waiver of Miranda rights. *North Carolina v. Butler* (1979), 441 U.S. 369, 373, 60 L.Ed.2d 286. In some cases, "waiver can be clearly inferred from the actions and words of the person interrogated." Id. "A suspect's decision to waive his Fifth Amendment privilege against compulsory self-incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct." *State v. Dailey* (1990), 53 Ohio St.3d 88, paragraph two of the syllabus.

{¶14} Defendant chose to speak to the officer following the officer's recitation of the Miranda warnings. Defendant told the officer that he understood those rights. He did not in any way indicate his wish to exercise any of his Miranda rights. He did not preface his response with "since I already told you," or any other phraseology in that vein. Rather, he, again, answered the questions of the officer in spite of being informed of his right to remain silent. The mere fact that the officer immediately repeated the same question following the Miranda warnings should have indicated to Defendant, a college student, that he was free to embrace his Miranda rights and remain silent. Defendant's acts indicate that he voluntarily, knowingly, and intelligently waived his Miranda rights.

{¶15} Defendant, citing *Westover v. United States* (1966), 384 U.S. 494, 16 L.Ed.2d 735, alleges that the lack of time or events separating the prior unwarned and subsequent warned statements vitiated his ability to validly waive his Miranda rights. First, we note that *Westover* involved a defendant subject to nearly 14 hours of interrogation prior to receipt of any Miranda warnings. Defendant can hardly argue that the facts of his case, a brief traffic stop during which he was never arrested, parallel fourteen hours of custody suffused with interrogation. Second, and more importantly, this issue has subsequently

been addressed in depth by the United States Supreme Court in *Elstad*, 470 U.S. at 317-18:

> A handful of courts have *** applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. *** The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative.

Because Defendant's first set of inculpatory statements were made voluntarily, a break in time is not necessary in order to find that Defendant voluntarily, knowingly, and intelligently waived his Miranda rights, and that his second inculpatory statements were also voluntary.

{¶16} This court does not mean to say that the recitation of Miranda warnings to a defendant following an unwarned confession will automatically result in admissibility of any later, Mirandized statements. Rather, each case must be dealt with according to the facts and circumstances at hand. On the facts of the case at hand, we find that both sets of Defendant's statements were voluntary and that Defendant voluntarily, knowingly and intelligently waived his Miranda rights. Accordingly, we overrule Defendant's first assignment of error.

ASSIGNMENT OF ERROR II

> "The trial court erred in denying [Defendant's] pretrial motion to suppress physical evidence seized by the Ohio State Highway Patrol from the trunk of [Defendant's] vehicle."

{¶17} In his second assignment of error, Defendant argues that the trial court should have suppressed the evidence seized by the officer from the trunk of his vehicle. Defendant alleges that the officer only had probable cause to search the passenger compartment of his vehicle, and not the trunk, because it is not probable that one would find burning marijuana in the trunk of a car. Given our determination as to the admissibility of Defendant's second set of inculpatory statements, we disagree.

{¶18} This court reviews de novo any determination of probable cause made by the trial court. *Ornelas v. United States* (1996), 517 U.S. 690, 699, 134 L.Ed.2d 911. The Fourth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, prevents unreasonable searches and seizures. Section 14, Article I of the Ohio Constitution is nearly identical, and 10 also prohibits unreasonable searches. *State v. Kinney*, 83 Ohio St.3d 85, 87, 1998- Ohio-425. "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant." *State v. Moore*, 90 Ohio St.3d 47, 49, 2000-Ohio-10, at 49, citing *Katz v. United States* (1967), 389 U.S. 347, 357, 19 L.Ed.2d 576, and *State v. Brown* (1992), 63 Ohio St.3d 349, 350. The State must show that probable cause existed, and that either a warrant was obtained or an exception to the warrant requirement applied. *Moore*, 90 Ohio St.3d at 49. Failure to meet either step results in suppression of the evidence seized in the unreasonable search. *Moore*, 90 Ohio St.3d at 49, citing *Mapp v. Ohio* (1961), 367 U.S. 643, 6 L.Ed.2d 1081.

{¶19} When a police officer validly stops an individual for a traffic violation, that officer must have further probable cause in order to conduct a search of the individual's vehicle. *Moore*, 90 Ohio St.3d at 49. After the officer has probable cause to believe the vehicle contains contraband, he may search the vehicle based on the automobile exception to the warrant requirement. Id. at 51. In this case, Defendant's admissible inculpatory statements relating to the drug paraphernalia gave the officer probable cause to search the trunk of Defendant's vehicle without a warrant pursuant to the automobile exception. We, therefore, overrule Defendant's second assignment of error.

{¶20} We overrule Defendant's assignments of error and affirm the judgment of the Wayne County Municipal Court.

Judgment affirmed.

LYNN C. SLABY
FOR THE COURT

WHITMORE, P.J.
BATCHELDER, J.
CONCUR

APPEARANCES:
ROBERT E. KERPER, JR., Attorney at Law, One Cascade Plaza, 20 th Floor, Akron, Ohio 44308, for Appellant.

MARTIN FRANTZ, Wayne County Prosecutor and KARA DODSON, Assistant Wayne County Prosecuting Attorney, 215 N. Grant Street, Wooster, Ohio 44691, for Appellee.

IN THE WAYNE COUNTY MUNICIPAL COURT

WOOSTER, OHIO

STATE OF OHIO)

Plaintiff)

)Case No. **CRB-02-12-0101**

v.)

STEPHEN FARRIS)

Defendant

Facts

Trooper Menges was on routine patrol on U.S. in Wayne County, Ohio. Near the U.S. 250 split he observed the defendant's vehicle traveling eastbound at 68, 69, 69, 68 m.p.h. The officer pulled the defendant over. When Trooper Menges approached the defendant's vehicle he smelled a light odor of burnt marijuana. The Trooper had drug training and was familiar with the odor burnt marijuana. He had smelled raw marijuana and then burnt marijuana while being trained at the Ohio State Patrol Academy. He had further stopped 200 cars where he smelled burnt marijuana inside. The defendant was told of the reason for the stop. He was asked to come back to the Patrol vehicle and was seated in the passenger seat. He was frisked and emptied his pockets before getting into the patrol car. He asked the defendant about the odor of burnt marijuana was told his house mates smoked it earlier. The defendant was then told that the Trooper was going to search his vehicle. He asked if there was anything in the vehicle and was told about what was in the trunk. The defendant was given Miranda warnings and again asked the same questions

about the source of the marijuana odor. The defendant again stated where it was in the vehicle trunk. The inside of the car was searched first and nothing was found. The trunk was searched next and a marijuana bowl with marijuana residue and rolling papers was found in a box. Trooper Menges did a N.I.K. test and the pipe came back positive for marijuana. The defendant was given a speed warning and a drug paraphernalia citation and was allowed to go on his way.

Counsel for the defendant raised the issue of the proper calibration of the frequency and deviation measurements of Trooper Menges' radar unit. It appears that this was done only once in the past year and not twice. There was no testimony that the radar unit was not working properly check the calibration of the unit. It was clear to this writer that the Trooper believed his radar unit was functioning properly when he clocked the defendant at 69 m.p.h. in a 60 m.p.h. zone. Further, the officer's visual estimation of the defendant's speed was 70 m.p.h.

Issues

1.) Reasonable articuable suspicion of wrongdoing to justify the stop

2.) Probable cause to search the vehicle

3.) Miranda warnings

Law

1.) An officer must possess a reasonable, articuable suspicion of wrongdoing to effectuate a traffic stop. See *Delware -v- Prouse*, 440 U.S. 648 and *Westlake -v- Kaplysh*, *118 O App 3d 18.* In the case subjudice, Trooper Menges had stopped the defendant for speeding, 69 in a 60 m.p.h. zone. He had done all of his required radar checks before using the

unit in question and found it to be in working order. Further, his visual estimation of defendant's speed was 70 m.p.h. There was no showing that the once a year versus a twice a year frequency and deviation check in any way affected the radar unit's accuracy. Trooper Menges had reasonable suspicion to stop the defendant.

2.) A trained officer who recognizes the odor of burnt marijuana, may search for same. See the case of *State -v- Moore*, 90 O St 3d 47. Trooper Menges was clearly qualified to detect and recognize the odor of burnt marijuana. Justice Lundberg Stratton goes on to say that "such an odor detected by a trained officer is sufficient to establish probable cause to search a motor vehicle pursuant to the automobile exception to the warrant requirement." In *U.S. -v- Ross*, 456 U.S. 798 the United States Supreme Court stated "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."

The vehicle in question was lawfully stopped. Pursuant to *State -v- Moore* (*supra*) Trooper Menges had probable cause to search for the burnt marijuana. Pursuant to *U.S. -v- Ross* (*supra*) he had the right to search the entire vehicle, including the trunk. The search was proper.

3.) The last issue for discussion is defendant's so called Miranda rights. The initial comments elicited from the defendant were *Berkemer -v- McCarty*, *468 U.S. 420* background stop questions. No Miranda rights need be given. Once the defendant was in the officer's vehicle he was subject to custodial interrogation and told the Trooper where the contraband was located. He was then mirandized and still gave the officer the location of the contraband. The first location statement should be suppressed, the second should not as full Miranda rights were given and voluntarily waived.

Even assuming arguendo that those statements were suppressed, the officer had probable cause to search and was going to search anyway, regardless of what the defendant said. In the case of *Nix -v- Williams*, 467 U.S. 431 (1984) the U.S. Supreme Court created the inevitable discovery exception to the 4th amendment. Since Trooper Menges was going to search anyway, he was going to inevitably find the contraband in defendant's belongings.

Conclusion

Defendant's motion to suppress is denied except as to the defendant's first custodial statement. Same will be suppressed.

/s/ Stuart K. Miller
Stuart K. Miller, Judge
April 29, 2003

No. 06-464

IN THE

Supreme Court of the United States

The State of Ohio,

Petitioner,

v.

Stephen F. Farris

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

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STATEMENT OF THE CASE

The State seeks review of one of the first cases applying this Court's recent decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), to address a question that has been considered by only a handful of state and federal courts and which ultimately has no bearing on the outcome of this case.

1. On the afternoon of December 18, 2002, Officer Richard Menges pulled over respondent Stephen Farris for speeding. Pet. App. at 1a. "When Farris lowered the passenger window, Menges smelled a light odor of burnt marijuana coming from inside the car. Menges had not observed Farris smoking, nor did he see him throw anything out a window." *Id.* Without administering a sobriety test, Officer Menges conducted "a pat-down search and found no evidence of contraband or drugs." *Id.* Officer Menges then "took [respondent's] car keys, and escorted [respondent] to his patrol car where he ordered [him] to sit in the passenger seat." *Id.* at 25a. "While they were seated in the front of the cruiser . . . [w]ithout administering a *Miranda* warning . . . Menges told Farris that he was going to search the car and then specifically asked whether there were any drugs or drug devices in the car." *Id.* at 2a. Farris admitted that there was a marijuana pipe in a bag in the trunk of the car. *Id.* Immediately thereafter, "Menges . . . administered *Miranda* warnings, but did not tell Farris that his previous admissions could not be used against him. He then asked Farris the same questions and obtained the same responses regarding the location of the drug paraphernalia." *Id.* Another officer arrived and, after finding nothing in the interior of the car, the officers searched the trunk and found a marijuana pipe and cigarette papers. *Id.*

Respondent filed a suppression motion on April 18, 2003, arguing that his statements both before and after the *Miranda* warnings were inadmissible because he was in custody when Officer Menges questioned him and because he was never properly afforded his *Miranda* rights. *Id.* at 25a.

He also argued that the pipe Officer Menges had seized from his trunk was inadmissible because it was the fruit of an illegal interrogation and because the officer lacked any independent basis for searching the trunk of his car. The State conceded that respondent was in custody during the interrogation and that the statements Officer Menges obtained before administering the *Miranda* warnings therefore were inadmissible.[1] But the State nonetheless contended that the administration of the warning was necessarily sufficient to render respondent's identical post-warning statements admissible.

The trial court held an evidentiary hearing on the suppression motion. At the hearing, Officer Menges acknowledged that respondent first disclosed the existence of the marijuana pipe in his trunk in response to questioning without any *Miranda* warning. Tr. of Proceedings at 13-14, *State v. Farris*, No. CRB02-12-0101 (Wayne County Mun. Ct. Apr. 18, 2003). The officer did not claim that his failure to provide the warning was based on any confusion about whether respondent was in custody during the interrogation. Nor did Officer Menges ever suggest that his failure to administer *Miranda* warnings at the outset of the interrogation was some kind of accident or oversight. Rather, Officer Menges matter-of-factly acknowledged that after giving the

---

[1] The state conceded the issue of custody before the Ohio Court of Appeals and in its brief in opposition to respondent's request for discretionary review by the Supreme Court of Ohio. *See* Br. of Pl.-Appellee at 5, *State v. Farris*, No. 03-CA-0022, (Ohio Ct. App. Feb. 25, 2004); Mem. in Opp'n of Appellee at 4, *State v. Farris*, 849 N.E.2d 985 (Ohio July 12, 2006) (No. 04-604). The State later attempted to contest the issue of custody in its merits brief in the Supreme Court of Ohio. *See* Br. of Pl.-Appellee at 2, *State v. Farris*, 849 N.E.2d 985 (Ohio July 12, 2006) (No. 03-CA-0022). However, the Supreme Court of Ohio concluded that respondent was in custody during the interrogation. *See* Pet. App. at 5a.

warning, he "re-asked [respondent] the same questions over again." *Id.* at 26. He also indicated that in his post-warning questioning he referred back to respondent's prior confession by asking "where the marijuana pipe" respondent had previously acknowledged having was located. *Id.* at 14. Respondent told him it was in a bag in the trunk. *Id.*[2]

Although the trial court found that respondent was in custody and that his pre-warning statements were inadmissible, it ruled that his post-warning statements were admissible because, in the court's view, "full *Miranda* rights were given and voluntarily waived." Pet. App. 36a. Accordingly, the court ruled that both the post-warning statements and the subsequently recovered contraband were admissible. *Id.* at 36a-37a.

Following the court's rulings, respondent pleaded no contest to possession of drug paraphernalia, while reserving the right to appeal the denial of his suppression motion. *Id.* at 26a. The court fined respondent one hundred and fifty dollars and suspended his driver's license for six months. *Id.*

2. The Ohio Court of Appeals affirmed. It held that respondent's post-*Miranda* statements were admissible because "both sets of [respondent's] inculpatory statements were voluntary," *id.* at 29a, and because "[t]he mere fact that the officer immediately repeated the same question following the *Miranda* warnings should have indicated to [respondent], a college student, that he was free to embrace his *Miranda* rights and remain silent," *id.* at 30a

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[2] Officer Menges' testimony on this score reads in full: "Um, I went ahead and read him his rights and after asking him if he understood and he advised that he did understand. Um, I asked him where the marijuana pipe was located and at that point he said that it was located in the trunk in one of his bags." Tr. of Proceedings at 14, *State v. Farris*, No. CRB02-12-0101 (Wayne County Mun. Ct. Apr. 18, 2003).

3. The Supreme Court of Ohio granted discretionary review and reversed. The court analyzed the admissibility of both respondent's statements and the physical evidence in light of the requirements of both the federal and state constitutions, noting that the "Ohio Constitution . . . is a document of independent force" which the Ohio Supreme Court sometimes construes to provide greater protection than the related provisions of the federal constitution. *Id.* at 17a (internal quotation omitted). Both require administration of *Miranda* warnings, although, the court explained, the consequences of a *Miranda* violation may vary under the state and federal constitutions. *Id.* at 17a-18a.

The court first held that respondent's post-warning statements were inadmissible. *Id.* at 3a-14a. The court did not say whether it was applying the federal or state constitution, or both, but it did look to this Court's decisions in *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Missouri v. Seibert*, 542 U.S. 600 (2004), which had been decided during the pendency of the appeal. The court observed that the two cases "stand on opposite sides of the line defining where prewarning statements irretrievably affect postwarning statements." Pet. App. 8a. *Elstad* held admissible inculpatory statements a suspect made to an officer after being *Mirandized* at police station, even though during a "brief discussion" at a suspect's home an hour earlier a different officer had by "oversight" prompted him to admit he had been at the scene of the crime. *See id.* at 8a-10a. *Seibert*, by contrast, held inadmissible a post-warning confession that was substantively identical to a pre-warning confession that the police had just obtained by means of an orchestrated attempt to evade *Miranda*. 600 U.S. at 604-05 (plurality opinion). A plurality of the Court explained that inculpatory statements repeated after mid-interrogation *Miranda* warnings were admissible only if the "warnings could function 'effectively' as *Miranda* requires." *Id.* at 611-12. Justice Kennedy concurred in the judgment, positing that "[w]hen an

interrogator uses [a] deliberate, two-step strategy, predicated upon violating *Miranda* . . . , postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps." *Id.* at 621 (Kennedy, J., concurring in the judgment).

The Supreme Court of Ohio found that the interrogation of respondent in this case was "much closer to *Seibert* than to *Elstad*." Pet. App. 12a. The court observed,

> the questioning . . . covered exactly the same subject both before the warning and after the warning. Both of [respondent's] statements were made in the police cruiser to the same police officer within moments of each other. Temporally and substantively, Menges's questioning of [respondent] constituted a single interrogation. Menges made no attempt to tailor the *Miranda* warning he eventually gave to the particular situation and did not convey any distinction whatsoever between statements that might come after the warning and those that came before. Thus, [respondent] was not in a position to make a *Seibert* informed choice.

Id.

The court noted, "*Seibert* presented the rare case in which the officer admitted that the two-part questioning was intentionally coercive." *Id.* at 14a. The court further observed that "*Seibert* was a plurality opinion, leaving somewhat in doubt whether the intent of the officer in garnering the prewarning statement is important in determining whether a postwarning statement is admissible," given the importance Justice Kennedy placed on the fact that the failure to give the *Miranda* warning at the outset was intentional in *Seibert*. *Id.* at 13a. But the court concluded that a "seeming lack of *official* police strategy" in the record in this case (developed before *Seibert* was decided) "to intentionally bait suspects into talking before the *Miranda* warning," *id.* at 13a (emphasis added), was insufficient to

render the statements admissible. Without saying whether it was undertaking to interpret *Seibert* or declare the rule under the Ohio Constitution, the Supreme Court of Ohio stated that "[w]e agree with the *Seibert* plurality and dissent that the intent of the officer doing the questioning is not relevant in a *Miranda* analysis." *Id.* at 14a. "*Miranda* itself provides a bright line for police behavior, and we believe that a bright line is also necessary in these types of cases." *Id.* Enforcing that line, the court held that respondent's post-warning statements should have been suppressed. *Id.*

Relying on similar considerations, the court then ruled that the physical evidence obtained as a result of those statements should have been excluded under the Ohio Constitution. The Court acknowledged that in *United States v. Patane*, 542 U.S. 630 (2004), this Court held that failure to provide required *Miranda* warnings does not support suppression of physical evidence seized as a result of unwarned statements. Pet. App. 14a-15a. The Supreme Court of Ohio, however, concluded that "Section 10, Article I of the Ohio Constitution provides greater protection to criminal defendants than the Fifth Amendment to the United States Constitution." *Id.* at 17a-18a. In particular, the court held that under the Ohio Constitution, "evidence obtained as the direct result of statements made in custody without the benefit of a *Miranda* warning should be excluded." *Id.* at 18a. To hold otherwise, the Court concluded, "would encourage law-enforcement officers to withhold *Miranda* warnings" in cases like this where "physical evidence is central to a conviction and testimonial evidence is not." *Id.* "We believe that the overall administration of justice in Ohio requires a law-enforcement environment in which evidence is gathered in conjunction with *Miranda*, not in defiance of it." *Id.*

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to resolve whether the plurality or Justice Kennedy's concurrence in *Missouri v. Seibert*, 542 U.S. 600 (2004), governs the analysis of two-step interrogations. That question does not warrant review by this Court at this time and, in any event, this case presents a poor vehicle for addressing it. In the two years since this Court decided *Seibert*, only a handful of courts have had occasion to consider challenges to two-step interrogations, and none appear to have found that strictly applying the plurality or Justice Kennedy's opinion was outcome-determinative in any case. To the extent that the Supreme Court of Ohio took a different initial theoretical approach than a few other courts have taken, and to the extent that approach is grounded in federal law and not the more protective Ohio Constitution, there is little reason to believe that any existing conflict has real practical significance.

This case illustrates the point. The record here – which was developed before *Seibert* was decided – strongly suggests that respondent's post-warning statements are inadmissible under either the plurality or Justice Kennedy's approach in *Seibert*, or even under a proper application of *Oregon v. Elstad*, 470 U.S. 298 (1985). This is because there is no evidence that the police officer's failure to give respondent his *Miranda* warnings at the outset of the interrogation was any kind of "good faith" error – or, indeed, that it was anything other than an intentional omission (regardless of whether any "official" police strategy to this effect exists in Ohio, Pet. App. 13a). Moreover, respondent's statements would be inadmissible even under *Oregon v. Elstad*, because the officer exploited respondent's pre-warning statements to pressure him into waiving his right to remain silent.

Accordingly, this Court should deny the petition in order to allow further consideration and application of *Seibert* in the lower courts and to await, if necessary, an appropriate case

with a record developed in a post-*Seibert* evidentiary hearing to resolve any substantial conflict that may arise in the future.

I. The State Exaggerates The Extent And Importance Of Any Disagreement Among The Courts of Appeal And State Supreme Courts.

Petitioner's claim of a significant and entrenched division among the lower courts over the proper application of the Court's decision in *Seibert* is meritless. Even in petitioner's greatly exaggerated estimation, only five out of fifty state supreme courts, and three out of twelve federal circuits, have had occasion to apply *Seibert* since it was decided two years ago. The actual numbers are half that, and any disagreement is virtually nonexistent. In reality, it is too early to tell whether there will ever be a conflict of any practical import that warrants review by this Court.

1. Petitioner argues that "[t]hree circuit courts and the Supreme Court of Kentucky[] have recognized Justice Kennedy's opinion as the proper holding of *Seibert*" while "at least three state supreme courts, including Ohio's, have treated the *Seibert* plurality as the holding of the case." Pet. 10. This is incorrect. In fact, outside of this case, petitioner is unable to identify any conflict among the state supreme courts and/or the federal courts of appeal.

a. Petitioner first exaggerates the number of courts applying Justice Kennedy's opinion to resolve suppression claims in two-step interrogation cases.

One of the decisions cited by petitioner, *United States v. Black Bear*, 422 F.3d 658 (8th Cir. 2005), expressly found that "[t]he *Seibert* case is inapposite to this case," *id.* at 664. The defendant in *Black Bear* had been given a *Miranda* warning and signed a waiver form before taking a polygraph. Immediately after the polygraph exam, law enforcement agents asked the defendant additional questions. *Id.* at 663. The agents then turned on a tape recorder, repeated the *Miranda* warning, and questioned the defendant on tape. *Id.*

The district court suppressed the taped statements under *Seibert*, but the Eighth Circuit reversed. The court found that *Seibert* was inapplicable because "*Miranda* warnings were given at the *beginning* of a continuous interrogation in the same room by the same officer who witnessed the warning at the outset." *Id.* at 664 (emphasis added).

In two of the other cases – *United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004), and *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006), *cert. denied sub nom. Haydon v. Kentucky*, 127 S. Ct. 142 (2006) – the courts were unable to determine the proper result under *Seibert* because the trial courts in those cases had conducted suppression hearings without the benefit of *Seibert* and accordingly had not made findings with respect to important factual questions such as whether the officers had deliberately withheld *Miranda* warnings during the initial phase of the interrogations. *Stewart*, 388 F.3d at 1086, 1091; *Jackson*, 187 S.W.3d at 308-09. Thus, while the Seventh Circuit and Kentucky Supreme Court indicated that they would apply Justice Kennedy's approach, neither court actually applied that standard. As a result, neither court has yet addressed basic questions of how *Seibert* is to be applied, including, for instance, who has the burden of establishing the officer's state of mind and what kind of circumstantial evidence may suffice to prove deliberateness. And, because of the lack of an adequate record, it was unclear in either case whether any difference between Justice Kennedy's and the *Seibert* plurality's approaches would have led to a different outcome.

The difference in standards may also have been irrelevant in the final case, *United States v. Mashburn*, 406 F.3d 303 (4th Cir. 2005), where the failure to initially provide a *Miranda* warning was plainly an oversight, *see id.* at 305, 309

n.5, and took place in circumstances quite similar to the facts of *Elstad*. *See id.* at 305.[3]

b. Petitioner likewise is incorrect in asserting (Pet. 11-12) that the supreme courts of Vermont and Louisiana have applied the *Seibert* plurality analysis to resolve cases involving two-step interrogations.

The decisions from Vermont and Louisiana are simply inapposite because neither involved a two-step interrogation in which the defendant is initially questioned without *Miranda* warnings, then given the warning and subjected to further questioning. The defendant in the Vermont case, *State v. Yoh*, 910 A.2d 853 (Vt. 2006), received *Miranda* warnings when he was first arrested and before each interview. *Id.* at 857-59. The violation of his *Miranda* rights was not the failure to provide the warning, but rather the failure to stop questioning when the defendant invoked his right to remain silent and asked for an attorney. *Id.* at 858, 860-61. Later, the defendant initiated further questioning, was given another *Miranda* warning, and confessed. *Id.* at 858-59. The Vermont Supreme Court held that the confession was admissible, despite the *Miranda* violation, because it came only after the defendant himself voluntarily initiated further discussions with the police. *Id.* at 862. While the court noted the defendant's reliance on *Seibert*, it recognized that it was faced with a different question – whether to exclude a confession when "police refused to end questioning after the defendant had invoked his *Miranda* rights, but reissued the

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[3] The State also implies that *People v. Paulman*, 5 N.Y.3d 122 (2005), holds that Justice Kennedy's test is the governing test. Pet. at 13. However, *Paulman* concluded that the statement in that case was admissible under either the plurality or Justice Kennedy's standard. *Paulman*, 5 N.Y.3d at 133 n.5 ("Because the statements in this case are admissible under the plurality's more stringent test, they are necessarily admissible under Justice Kennedy's analysis.").

Miranda warnings prior to the defendant's confession after the defendant had initiated a second interview," *id.* at 862 – and relied instead on an on-point decision from the Ninth Circuit. *Id.*

Similarly, in *State v. Leger*, 936 So. 2d 108 (La. 2006), Supreme Court of Louisiana rejected the defendant's reliance on *Seibert*, finding the "circumstances presented here to be distinguishable from those at issue in *Seibert*," *id.* at 133, because the "defendant had been *Mirandized* repeatedly and had previously signed a waiver of rights form" before the interview in which he confessed, *id.* at 133-34.

2. That leaves petitioner with the claim that the Supreme Court of Ohio created a conflict with a few federal courts of appeal with respect to exactly what theoretical approach applies to two-step interrogations after *Seibert*. There is no good reason to believe that it did. While the Supreme Court of Ohio did embrace the test applied by the plurality in *Seibert*, it is unclear whether the court adopted that test as a matter of state or federal law. In his brief to the court below, respondent argued that his statements should be suppressed under both state and federal law. *See* Br. of Appellant, at 9-13, *State v. Farris*, 849 N.E.2d 985 (Ohio July 12, 2006) (No. 03-CA-0022). In its decision, the Supreme Court of Ohio made clear that *Miranda* warnings are required under the state constitution which, the court took pains to point out, in some cases "provides greater protection to criminal defendants" than does the federal constitution. Pet. App. 18a. The court demonstrated its willingness to depart from this Court's precedent as a guide for state constitutional protections in this very case, explicitly declining to adopt the suppression rule of *United States v. Patane*, 542 U.S. 630 (2004), and holding instead that under state law, "evidence obtained as the direct result of statements made in custody without the benefit of a *Miranda* warning should be excluded." Pet. App. 18a.

Although the Supreme Court of Ohio did not speak as clearly with respect to the exclusion of petitioner's

statements, there is reason to believe that the Court adopted the *Seibert* plurality test to effectuate respondent's rights under the Ohio Constitution. In resolving the tension between the plurality and Justice Kennedy's opinions, the Ohio Supreme Court spoke in terms demonstrating an independent exercise of judgment indicative of the court's interpreting state law rather than attempting to discern and follow this Court's federal jurisprudence. Thus, the court "*agree[d]* with the *Seibert* plurality," rather than declaring the plurality opinion to govern the case of its own force. *Id.* at 14a (emphasis added). And in explaining this conclusion, the court did not justify its decision by reference to the text of the *Seibert* opinion, but rather upon its own "*belie[f]* that a bright line is also necessary in these types of cases." *Id.* (emphasis added). While petitioner would have this Court view such statements as evidence of the Ohio Supreme Court's intent to "effectively overrule[] a decision of this Court regarding federal law in Ohio," Pet. 16, the more plausible and respectful interpretation is that the court was quite aware of the limitations of its authority to resolve any divergence between the plurality and Justice Kennedy's opinions as a matter of federal law, and wisely chose to avoid the problem by adopting the plurality rule to effectuate the state constitution.

Of course, if it becomes apparent in future cases that the Ohio courts are applying the *Seibert* plurality test as a matter of federal, rather than state law, and if other courts adopt the same approach, this Court will have ample opportunity to resolve any split of authority at that time. The State can hardly claim that its interest in this particular prosecution – a misdemeanor resulting in a small fine and a six-month suspension of a driver's license – is sufficiently weighty to require this Court's immediate and premature intervention.

4. Awaiting further consideration and application of *Seibert* in the lower courts also makes sense for the additional reason that it may become apparent with experience that the

question presented is of little general importance. Cases involving pre-*Seibert* interrogations are clearing out of the courts, and police departments on the ground are just beginning to adjust to *Seibert*. As they do so, there is every reason to believe that two-step interrogations triggering litigation will prove to be rare. *Miranda*'s requirement that officers advise suspects of their rights at the outset of custodial interrogations is well-established and understood by all police officers. This Court's decision in *Seibert* should also significantly deter officers from using the two-step interrogation method. When such cases do arise, therefore, there is every reason to expect that the failure to provide the initial warning either will have been inadvertent (in which case the statement is unlikely to be suppressed under either *Seibert* standard)[4] or that it will occur in circumstances giving rise to an inference of deliberation (in which case the statement ordinary will be suppressed under either *Seibert* standard).[5]

Even if some small fraction of intermediate cases eventually arise in which the difference in the *Seibert* standards seems, at least theoretically, be outcome-determinative, it is too early to know whether the different standards will actually produce divergent results. For example, no court has yet decided who bears the burden of proof regarding deliberateness. *See, e.g.*, *Mashburn*, 406 F.3d

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[4] *Compare Seibert*, 542 U.S. at 614-15 (plurality opinion), *with id.* at 622 (Kennedy, J., concurring in the judgment).

[5] *See, e.g.*, *Stewart*, 388 F.3d at 1091 (7th Cir. 2004) (noting that once deliberateness is found, "the analysis of the *Seibert* plurality and Justice Kennedy's concurrence merge"). Notably, Justice Kennedy's test looks to the presence of "curative measures," and the curative measures that he suggests are nearly identical to the objective factors suggested by the plurality in its test for "effectiveness." *Compare Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment), *with* 542 U.S. at 615-16 (plurality opinion).

at 309 n.5 (reserving this question). But if courts follow the general rule that the government carries the burden of establishing that it obtained a valid waiver of the right against self-incrimination, *Colorado v. Connelly*, 479 U.S. 157 (1986), cases like this one – in which records lack definitive proof either way – will not turn on which standard from *Seibert* controls. The State's failure to provide any excuse for the officer undertaking a two-step interrogation will be dispositive. In any event, it is clear at this point that it is far too soon for the State to insist that the nascent divergence of authority it alleges is so important as to require immediate resolution by this Court.

II. This Case Presents A Poor Vehicle For Answering The Question Presented.

Even if an important and substantial conflict over the legality of two-step interrogations existed, this case would be a poor vehicle for resolving it.

1. The resolution of the question presented is unlikely to have any impact on the eventual resolution of the case.

First, there is no ground to believe that the State would succeed under either the plurality or Justice Kennedy's analysis in *Seibert*. As discussed *infra*, the State failed to establish below that the failure to provide initial *Miranda* warnings was inadvertent and, accordingly, respondent's admissions would be subject to suppression under Justice Kennedy's standard as the product of a "two-step interrogation technique . . . used in a calculated way to undermine the *Miranda* warning." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment). Moreover, even if this Court concluded that the failure to provide warnings was not deliberate, the statements would nonetheless be suppressed under *Elstad*. In that case, this Court recognized that a midstream *Miranda* warning may be "improper" – and thus insufficient to avoid suppression of post-warning statements – if the officer "exploit[s] the unwarned admission

to pressure respondent into waiving his right to remain silent." *See Elstad*, 470 U.S. at 316-18; *see also Seibert*, 542 U.S. at 621 (Kennedy, J., concurring in the judgment) (reaffirming this principle); *id.* at 628-29 (O'Connor, J., dissenting) (same); *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (evidence that suspect was "tricked" into waiving his rights "will, of course, show that the defendant did not voluntarily waive his privilege."). Here, Officer Menges described that after providing the *Miranda* warning, he immediately referred back to the prior unwarned statement, first asking not *whether* there was any contraband in the car, but rather *where* the contraband was located. Tr. of Proceedings, at 14, *State v. Farris*, No. CRB02-12-0101 (Wayne County Mun. Ct. Apr. 18, 2003). As Justice Kennedy observed in *Seibert*, "[r]eference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating." 542 U.S. at 621. Thus, in a case similar to this one, the Alaska Court of Appeals held that the police officer's interrogation was improper under both the plurality's test in *Seibert* and the exploitation prong of *Elstad* reaffirmed by the other members of the *Seibert* Court. *See Crawford v. State*, 100 P.3d 440, 450 (Alaska Ct. App. 2004) ("[E]xploitation" exception of *Elstad* met where officer elicited confession, immediately administered *Miranda* warning, "and then, essentially without pause, . . . reminded [the defendant] of this confession and asked him to re-affirm it.").

Second, as noted above, the Supreme Court of Ohio may well have intended to adopt the *Seibert* plurality analysis as a matter of state constitutional law, and might do so explicitly on remand even if this Court were to hold that the plurality test was inapplicable here as a matter of federal law. *Cf. Piccirillo v. New York*, 400 U.S. 548, 549 (1971) (per curiam) (dismissing writ as improvidently granted when it became clear that state law ground would resolve the case, making the Court's "determination upon the fundamental constitutional

question underlying this case . . . in no sense necessary to its resolution in this instance").

Finally, petitioner does not seek review of the Ohio Supreme Court's suppression of the physical evidence on state law grounds. *See* Pet. App. 18a (holding that "the physical evidence obtained as a result of the unwarned statements made by Farris in this case is inadmissible pursuant to Section 10, Article I of the Ohio Constitution"). Accordingly, respondent's conviction will be vacated and he will be entitled to a new trial no matter what this Court decides. At that trial, it is quite difficult to imagine the State persuading a jury that respondent was guilty of possession of drug paraphernalia beyond a reasonable doubt based solely on a police officer's testimony that he smelled an odor of marijuana in the car (but found no drugs or paraphernalia in the car) and that respondent told him there was a pipe in the car (which the prosecution is unable to produce). The State, for all practical purposes, is asking this Court to issue an advisory opinion.

2. The lack of an evidentiary record developed in light of the Court's decision in *Seibert* is an independent reason to deny certiorari in this case. This Court has repeatedly recognized that the development of constitutional principles is best undertaken in the context of concrete cases with fully developed records. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 221 (1983); *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (per curiam). Yet the evidentiary hearing in this case took place before *Seibert* was decided and, for that reason, was not tailored to the factors the members of this Court found relevant in that case. Attempting to apply or elaborate *Seibert* in these circumstances is inadvisable as a general matter and would run the real risk of the Court being unable to resolve the case due to deficiencies in the record.[6]

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[6] This Court will have ample opportunity to return to *Seibert* in cases with fully developed records, if it chooses to do so. For

3. Finally, the State itself argued in the Supreme Court of Ohio that this case was a poor vehicle for resolving any questions relating to the application of *Seibert*, although for a different reason. When this Court issued its opinion in *Seibert* – after the Supreme Court of Ohio had granted discretionary review, but before briefing was completed – the State urged the state court to dismiss the appeal as improvidently allowed. Br. of Pl.-Appellee at 2, *State v. Farris*, 849 N.E.2d 985 (Ohio July 12, 2006) (No. 03-CA-0022). The State explained that "[b]ecause there was a United States Supreme Court decision, *Oregon v. Elstaad* [sic] (1985), 470 U.S. 298, which the state believed dispositive of the instant case, the state neglected to fully consider other issues in the case." *Id.* In particular, the State asserted that it had "wrongly conceded custody in its memorandum opposing jurisdiction and in its brief in the court of appeals." *Id.* While the State acknowledged that the Supreme Court of Ohio could hold it to its concession, it "respectfully suggest[ed] that other courts and lawyers would be better served if this Court considers the effect of *Missouri v. Seibert*, supra in a case in which custody depends not upon an erroneous concession but upon an actual arrest." *Id.* at 10. The State has not explained why it now believes that this case presents an appropriate vehicle to consider the effect of *Seibert*, despite its prior representations to the contrary to the court below.

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example, two of the cases cited by petitioner have been remanded for full evidentiary hearings on *Seibert* issues. *See United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004); *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006), *cert. denied sub nom., Haydon v. Kentucky*, 127 S. Ct. 142 (2006).

III. The Supreme Court Of Ohio Correctly Held That Respondent's Statements Should Be Suppressed.

Certiorari is also unwarranted because the Supreme Court of Ohio correctly ordered suppression of respondent's statements.

The admissibility of respondent's post-*Miranda* statements as a matter of federal law turns on this Court's decisions in *Elstad* and *Seibert*. In *Elstad*, prior to any *Miranda* warnings, the defendant made a cursory admission that he had been present at the scene of a robbery, telling a police officer: "Yes, I was there." 470 U.S. at 300-01. The defendant made the admission in his own living room, while a second officer was talking to the defendant's mother in another room. *Id.* This Court characterized the initial failure to warn as an "oversight" that was presumably explained either by "confusion" at the time as to whether the defendant was actually in custody or by the fact that the first officer had not yet begun interrogating the defendant. *Id.* at 315-16. The defendant was subsequently transported to the police station, where, one hour later, the second officer read him his *Miranda* warnings. *Id.* at 301. The defendant proceeded to make a full confession that went far beyond his initial statement that he "was there" at the robbery scene. *See id.* at 301-02. This Court held that the defendant's post-*Miranda* confession should not be suppressed simply because he had made an earlier, unwarned confession. *See id.* at 318.

The facts of *Seibert* present the "opposite extreme." *Seibert*, 542 U.S. at 616 (plurality opinion). There, the defendant was interviewed initially by an officer at the police station and confessed, prior to any *Miranda* warnings. *Id.* at 604-05. After a twenty-minute break, the same officer then read the defendant her *Miranda* rights and continued the interview, in the same location, obtaining a statement that was "'largely a repeat of information . . . obtained' prior to the warning." *Id.* at 605-06 (alteration in original). There was no question of confusion or oversight in *Seibert*, because the

defendant was clearly in custody and was clearly being interrogated. *See id.* at 616. The police officer also admitted to making a "conscious decision" to pursue a two-step interrogation technique in order to evade *Miranda*. *Id.* at 605-06. A majority of this Court held that on these facts, the defendant's post-*Miranda* confession should be suppressed. *See id.* at 604.

The Supreme Court of Ohio correctly determined that facts of this case are "much closer to *Seibert* than to *Elstad*." Pet. App. 12a. As in *Seibert*, the same officer obtained both the pre- and post-*Miranda* admissions. *Id.* The admissions were made moments apart and in the same location, inside the questioning officer's police cruiser. *Id.* Respondent's statements after the *Miranda* warnings were "virtually identical" to his pre-*Miranda* statements. *Id.* at 5a. In eliciting those statements, the officer relied on information respondent had divulged in his pre-*Miranda* confession. Tr. of Proceedings at 14, *State v. Farris*, No. CRB02-12-0101 (Wayne County Mun. Ct. Apr. 18, 2003). And there is no suggestion that the officer's failure to warn in this case was an issue of oversight or confusion as to whether Respondent was already in custody or being interrogated.

Under these circumstances, in fact, suppression was required under either the plurality or Justice Kennedy's analysis in *Seibert*. While Justice Kennedy would limit suppression to cases in which "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning," 542 U.S. at 622 (concurring in the judgment), he did not elaborate on the circumstances under which such calculated behavior is to be found. "[T]he intent of the officer will rarely be as candidly admitted as it was [in *Seibert*]." 542 U.S. at 616 n.6 (plurality opinion). Lest the protections afforded under Justice Kennedy's view of *Miranda* be subject to easy evasion, defendants must be permitted to prove deliberateness through objective evidence regarding the nature of the interrogation. And, indeed, this

Court has long recognized that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (equal opportunity employment case). Consistent with the need for "clarity" in the administration of *Miranda*, see *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment), and in light of the "temptations for abuse inherent in the two-step technique," *id.* at 621, the use of a two-step process in the absence of any testimony or evidence that the initial failure to warn was inadvertent should suffice to establish a deliberate evasion of *Miranda* for purposes of Justice Kennedy's test.

The officer in this case did not claim that he did "not realize that [respondent was] in custody." *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring in the judgment). Nor was this a case in which the officer did "not plan to question the suspect or [was] waiting for a more appropriate time" to interrogate him. *Id.* Instead, it is uncontested that the officer took respondent into custody and intended to immediately interrogate him at the scene. And although the officer did not expressly admit that he withheld the *Miranda* warnings on purpose, he also did not deny that the failure to provide the warning was intentional. Indeed, the fact that the officer "immediately" (Pet. App. 2a) read Farris his *Miranda* warnings after obtaining a confession strongly suggests that his actions were intentional. It would not have been particularly believable for the officer to assert that although he initially forgot to issue the warnings, he just happened to remember *Miranda* a few seconds after obtaining respondent's initial confession.

To be sure, the Supreme Court of Ohio noted that there was a "seeming lack of an official police strategy" here to bait suspects into confessing and then repeating those damaging

statements after being given *Miranda* warnings. *Id.* at 13a. A "seeming lack" of such a strategy, of course, is not a finding that an official police strategy did not exist. But more importantly, even if no such "official" policy existed, that does not say anything with respect to whether the *individual officer* in this case decided on his own to evade *Miranda*. And Justice Kennedy's test looks to the intent of an individual interrogator and is not restricted to cases involving an "official" police strategy. *See Seibert*, 542 U.S. at 621-22 (Kennedy, J., concurring in the judgment).

In short, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and right to retained or appointed counsel." *Miranda*, 384 U.S. at 475. In light of the evidence as a whole, the Supreme Court of Ohio correctly determined that the State did not sustain that burden in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No.06-0464

In the Supreme Court of the United States

The State of Ohio, Petitioner,

v.

Stephen F. Farris, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF FOR THE STATE OF OHIO

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REPLY BRIEF FOR THE STATE OF OHIO

1. The critical reason why this Court should grant the petition is that the circuit courts and state supreme courts are divided on whether a failure to give the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) mandates suppression when there is no police strategy to omit the warning. This case presents a perfect vehicle to review this important and reoccurring issue.

As the petition explains (at 12-13), the holding by the Supreme Court of Ohio directly conflicts with decisions of the Fourth and Seventh Circuits, which have held that when determining if post-*Miranda* warning statements made in a two-part interrogation are admissible, a court is to apply *Oregon v. Elstad*, 470 U.S. 298 (1985), unless a deliberate two-step strategy was employed. *See U.S. v. Mashburn*, 406 F.3d 303 (4th Cir. 2005) ("Kennedy's opinion therefore represents the holding of the *Seibert* Court: The admissibility of postwarning statements is governed by *Elstad* unless the deliberate 'question-first' strategy is employed."); *United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2005) ("Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*."). The petition also demonstrates (at 12-13) that the Supreme Court of Ohio's decision is out of line with several other decisions, including cases from the Eighth Circuit, Kentucky, and New York. This demonstrates the confusion caused by *Missouri v. Seibert*, 542 U.S. 600 (2004). As explained in the Petition and below, because of the issue's reoccurring nature and its importance to police officers, citizens, and the courts, this conflict warrants this Court's resolution.

2. Respondent presents three arguments for denying review. Respondent contends that (1) the State exaggerates the extent and importance of any disagreement among the courts (Br. in

Opp. 8-14); (2) this case presents a poor vehicle for answering the question presented (Br. in Opp. 14-17); and (3) the Supreme Court of Ohio correctly held that respondent's statements should be suppressed (Br. in Opp. 18-21). None of those contentions have merit.

a. The petition discusses (at 14-16) the relevant holdings of this Court that support the conclusion that suppression is not warranted when there is no deliberate use of the two step interrogation strategy and no deliberate coercion. As noted above, at least two circuits have directly concluded that this is *Seibert*'s holding.[1] Several other courts have agreed with them. Pet. App. at 12-13. The Supreme Court of Ohio, however, disagrees (it appears Vermont and Louisiana also disagree). Pet. App at 11-12.

The Respondent takes great pains in attempting to show that the conflict does not matter or will only change a small number of cases. If that were true, however, it is unlikely that the members of this Court's plurality and Justice Kennedy would have written 3 opinions covering 18 pages of the United States Reports to discuss the issue in *Seibert*. If the conflict were meaningless, Justice Kennedy could have just joined Justices Stevens, Souter, Ginsburg, and Breyer to create a clear majority. He did not do this, and they did not join him. The members of the Court that understood the conflict in the approach is real, and it is important. Further, if the conflict were meaningless, lower courts would not be spending time trying to figure out how to apply *Seibert* and determine which opinion should be followed. *See*, Pet. at 9-13.

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[1] Contrary to Respondent's contention, the Seventh Circuit's determination is part of its holding because it is a necessary part of the remand instructions.

Respondent also argues that the Court should put off reviewing this issue until it is clear that Ohio is applying federal law or more courts join the split. In this case, no one, save Farris, benefits from this approach. There is already a clear conflict between at least two circuit courts and the Supreme Court of Ohio. Several other courts are also involved in the split. In only two years, at least eight courts have expressed views on the proper interpretation of *Seibert*. The split is real and important. Delaying the resolution of *Seibert*'s application in cases such as this one will only cause more confusion, inappropriately hinder the prosecution of future cases, and ultimately undermine *Seibert*'s holding.

Finally, Respondent's argument that *Seibert* type cases will soon cycle out of the justice system is simply incorrect. This case has substantial recurring importance, and Respondent fails in his attempt to diminish that importance. In fact, the issue arises with regularity. Therefore, this case warrants this Court's review.

Courts are often faced with situations where police officers obtain statements prior to the reading of *Miranda* rights. That is not because officers are unfamiliar with *Miranda*, and it will not be because officers are unfamiliar with *Seibert*. It is because the taking of unwarned statements will inevitably occur in the course of routine police work.

When incriminating statements are unexpectedly made, police officers will then administer appropriate warnings. If an officer repeats the inculpatory admission, the *Seibert* scenario is repeated.

As this Court recognized in *Elstad*, *Miranda* applies only when an individual is in "custody," but "the task of defining 'custody' is a slippery one, and 'policemen investigating

serious crimes [cannot realistically be expected to] make no errors whatsoever." 470 U.S. at 309 (quoting *Michigan v. Tucker*, 417 U.S. 433, 446 (1974)). This case provides an additional example of how officers acting in complete good faith can elicit unwarned statements that lead to derivative evidence. This case, therefore, warrants this Court's resolution. Whatever the merits of Respondent's and the Supreme Court of Ohio's contrary view, this Court alone can resolve the disagreement over the meaning of this Court's precedents.

b. The petition also shows how this case is a valid, useful, and proper vehicle for resolving the question presented. The issue is cleanly presented and outcome determinative. Initially, it is important to see through Respondent's attempt to cloud the fact that the issue presented is one of pure federal law, and the fact that the Supreme Court of Ohio treated it that way. Similar provisions of the United States's Constitution and Ohio's Constitution are harmonized in Ohio. *State v. Robinettee*, 80 Ohio St.3d 234, 239 (1997). While the Ohio Constitution is a document of independent force, for the treatment of similar provisions to diverge there must be persuasive reasons. *Id.* For this reason, the Supreme Court of Ohio clearly identifies when it relies upon state but not federal law for a decision. *See*, Pet App 16a-18a.

The Supreme Court of Ohio never gave a reason to depart from federal law when discussing the issue presented to this Court. In fact, it only departed from federal constitutional law on a separate issue. This occurred after the court's discussion of the issue presented in the Petition. Perhaps the most telling fact is that the Supreme Court of Ohio does not cite a single Ohio case or constitutional provision when analyzing the issue presented to this Court. It only discussed

federal law, because it was only applying federal law (and doing so incorrectly). This case is a proper vehicle for review because no state law determinations cloud the issue presented.

This case is also a proper vehicle to use to determine the issue presented because the statements would not be suppressed under Justice Kennedy's standard because there was no strategy to avoid *Miranda*. *See*, Pet. App. 12a-13a. Further, as explained in the Petition (at 15-16), if Ohio's courts faithfully apply *Elstad*, Respondent's statements are admissible and there is no justification under federal *or state* law to suppress the evidence.

Finally, Respondent's reliance on the State's attempt to have the case remanded to Ohio's appellate court is not relevant at this point. The State was seeking to have the lower courts apply *Seibert* so the Supreme Court of Ohio could review a decision directly considering *Seibert*. The Supreme Court of Ohio decided that was not necessary and reviewed the intervening decision in *Seibert* on its own. Now that the Supreme Court of Ohio has ruled, the State's concern is no longer relevant. Unlike the Supreme Court of Ohio, this Court has a decision directly dealing with *Seibert* and that decision was made after full consideration of the case. The issues that caused the State to seek a remand for further consideration in light of *Seibert* no longer exist. Therefore, the Respondent's reliance on that attempt as a way to demonstrate that this case is a poor vehicle to resolve the important questions it presents is inaccurate. The issue presented warrants this Court's resolution and this case is an ideal vehicle to use for that purpose.

c. As explained in the Petition (at 15-16) Farris's statements should have been admitted under *Elstad* because they were

not obtained through deliberately coercive or improper tactics. Further, overturning the Supreme Court of Ohio will dramatically change the outcome of this case. In order to conceal this fact, the Respondent mischaracterizes the Supreme Court of Ohio's decision to suppress evidence. In order to suppress the evidence, the Supreme Court of Ohio expressly departed from this Court's decision in *United States v. Patane*, 542 U.S. 630 (2004) and created a new Ohio rule mandating the suppression of evidence collected "in defiance of [*Miranda*]." Pet. App. at 18a. If this Court determines that Respondent's post-warning statements are admissible, then even under the new Ohio rule there is no reason to suppress the evidence because it was not collected in defiance of *Miranda*. If Respondent's post-*Miranda* warning statement is admissible, the evidence in this case would again be admissible under the new Ohio rule without any further action. Since this issue is outcome determinative, the Petition should be granted and this issue of law should be resolved.

CONCLUSION

For the forgoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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